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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES

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UNITED STATES OF AMERICA,

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STATE OF MAINE, *et al.*,

Defendants.

EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES

INTRODUCTION

This Brief is submitted on behalf of the defendant States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia ("the Common Counsel States").[1]

The issue in this case is whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf.

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[1] The other defendant States, North Carolina, South Carolina and Georgia, are separately represented. Throughout this Brief the term "State" is capitalized when it refers to a State of the United States, and not otherwise.

Plaintiff raised this issue by its complaint of April 1969 against all the Atlantic coastal States,[2] asserting an exclusive right on behalf of the federal government. The States each answered, claiming interests in the area in question, denying plaintiff's alleged exclusive right, and asserting exclusive rights to explore and to exploit on behalf of themselves.

The plaintiff thereupon moved for judgment on the ground that the States' claims were foreclosed by this Court's decision in *United States v. California*, 332 U.S. 19 (1947), and subsequent cases. The States opposed that motion and moved for reference of the case to a special master for the introduction of evidence bearing on the title and interest which they claimed. On June 8, 1970, the Court granted the States' motions and designated the Honorable Albert B. Maris as Special Master.

Extensive evidentiary proceedings were held before the Master. A total of 1,257 exhibits were introduced by all parties, comprising many thousands of pages.[3] The parties presented a total of ten expert witnesses on English, colonial and international law and legal history and other relevant subjects; the transcript comprises 2,800 pages. Extensive cross-examination of these witnesses was con-

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[2] The State of Florida moved for and obtained severance of the action against it on the ground that its situation raised distinct issues. Florida's case was tried separately and is now also before this Court, Original No. 52. The defendants in this action are thus the Atlantic coastal States other than Florida.

[3] A list of the 827 Exhibits introduced by the Common Counsel States appears at Appendix (App.) 559-640. In this Brief, Exhibits of the Common Counsel States will be cited to the Appendix if they are reproduced therein, and otherwise cited as "Exhibit ____." Exhibits of other parties are identified by the name of the party. Portions of the Transcript not reproduced in the Appendix are cited as "Tr. ____." In quotations and in the Appendix, footnotes are normally omitted.

ducted. The record herein represents the first and only evidentiary record ever amassed on the basic issue of State versus federal title in any of the continental-shelf litigation from the *California* case onwards.

The Master issued his Report on August 27, 1974. He concluded that, notwithstanding this Court's reference to him, he was bound by the Court's decision in *California* to decide in favor of the plaintiff by granting plaintiff's outstanding motion for judgment. The Master also concluded that the evidentiary record did not compel a departure from the *California* doctrines as he understood them so as to warrant a recommended decision in favor of the States.

The Common Counsel States' Exceptions to the Master's Report are stated immediately below, and their Brief on the merits follows. The Brief is, of necessity, lengthy. This litigation involves issues unusually large in number, broad in scope and momentous in their consequences. The record covers complex developments of history and legal history spanning several centuries.

For the assistance of the Court we also file a Supplemental Brief ("S.B."), consisting essentially of our Post-Trial Brief to the Master, in which arguments are developed and the record is analyzed more fully than is possible in this Brief. In general, in this Brief we refrain from detailed discussion of and citations to the historical evidence, but rather refer the Court to the portions of the Supplemental Brief where the full discussion and references are set forth. The Appendix, in turn, consists of a bare minimum of selections from the record, giving only an indication by way of sample of the types of material contained in the original record which, in our submission, establishes the States' claims.

EXCEPTIONS

The Common Counsel States except to the following findings and conclusions in the Master's Report:

1. The United States' motion for judgment should be granted on the basis of *United States v. California* and subsequent cases (Report, pp. 8-21).

2. As a matter of law, ownership of the continental shelf is an appendant of "external sovereignty" and is thus vested in the United States (pp. 22-24, 78 §§ 18, 19).

3. All new rights created in and after 1945 in the continental shelf arose on behalf of the federal government, not the States (pp. 68-71, 80 §§ 24, 26, 27).

4. Historical evidence demonstrating the assertion and exercise of English, colonial and state sovereignty and dominion over the three-mile belt is irrelevant to the issues in this litigation (pp. 24-25, 58, 80 § 25).

5. The sovereignty and dominion over the English seas which formed part of English law before 1603 was "protective" only, not involving territorial sovereignty, property rights, admiralty jurisdiction over foreigners or control of fisheries (pp. 27-29, 75 §§ 1, 2, 6).

6. The English seas were not, as a matter of English law, within the realm of England in the 17th century (p. 35).

7. The admiralty jurisdiction in the English seas in the 17th century was not a "territorial" jurisdiction (pp. 31-33, 75 § 5).

8. English and international law in the 17th century limited sea and seabed ownership to what was occupied in fact at any given time by the navy of the state asserting ownership, and there were no recognized boundaries to the seas which were subject to crown ownership (pp. 35-40).

9. Between 1688 and 1776 crown ownership of the seabed disappeared from English law and ceased to be countenanced by international law (pp. 39-47, 75-76 §§ 4, 6-8, 10).

10. The American colonial charters did not convey sovereignty and dominion in the marginal seas and seabed (pp. 47-56, 76-79 §§ 12, 21).

11. The crown and the American colonies did not claim or exercise rights of sovereignty and dominion in the marginal seas and seabed during the colonial period (pp. 56-60, 77 §§ 13-16, 78-79 § 21).

12. At some time—either at independence, by the Articles of Confederation, by the Peace of Paris, or by ratification of the Constitution—the States intended to surrender, and did surrender, any rights of sovereignty and dominion in their marginal seas and seabed which they posessed to the federal government (pp. 60-65, 77-79 §§ 17-21, 81 § 28).

13. After the disappearance of 17th-century claims international law recognized no territorial or property rights in the seabed of the marginal sea beyond three miles except in a few isolated cases where rights were based on strict occupation; and the formulation of the continental-shelf doctrine in and after 1945 created wholly new rights out of nothing (pp. 42-43, 46, 53-54, 65-71, 76 §§ 9, 11, 78-80 §§ 21-23).

14. The Submerged Lands Act, construed as limiting the Common Counsel States to a three-mile belt of ownership while permitting the Gulf States to establish ownership out to ten miles, is constitutional (pp. 71-72, 80 § 26).

15. The plaintiff is entitled to judgment (p. 81 § 29).

SUMMARY OF ARGUMENT

1. This Court has not heretofore determined whether the Atlantic coastal States or the federal government possess the right to develop the mineral resources of the continental shelf. Nevertheless, the Master ruled that *United States v. California*, 332 U.S. 19 (1947), required judgment for the federal government, since he read that decision to make ownership rights a necessary adjunct to federal foreign-affairs and defense powers. This ruling misreads *California*. Its premise is patently unsound since the express federal powers over foreign affairs and defense are ample to secure federal interests in the continental shelf, just as on land, without any need for the property itself to be federally owned. Any such "inseparability" concept was repudiated by Congress in the Submerged Lands Act and by this Court in *United States v. Louisiana*, 363 U.S. 1 (1960).

The plaintiff seeks judgment as a matter of law on the different but equally unsound ground that *California* found as a historical fact that the Atlantic States did not own the resources of the seabed along their coasts. On the contrary, *California*—because of the nature of the equal-footing claims advanced by the State—focused on whether there existed a uniform three-mile belt in the 18th century, and the States' claims here rest on no such premise. Also, the ruling in *California* derived from a lack of evidence, not a definitive historical finding, and the States have here produced massive evidence in support of their historic claims.

The States' historic claims in this case are, moreover, supported by a presumption of validity. Under the Constitution, the States are residual owners of property. The common understanding for a century and a half was that the States owned the submerged lands adjacent to their coasts. Extensive practice, including State grants of sub-

merged lands to the federal government, confirmed this understanding. State ownership will merely compensate for the expenses which development imposes on the coastal States.

2. The States' title traces back to colonial charter grants and is reinforced by the historical background and context of those grants. Extensive evidence shows that English law and practice prior to and during the 17th century, in which the grants were made, recognized the sovereignty and ownership by the crown of the English seas and their resources. International law in this period had not established any consensus inconsistent with such claims to ownership of the resources of the sea. Against this background it would be astonishing if similar rights had not been granted and established in the American colonies, and the evidence shows that they were.

Colonial charters, in the most explicit terms, conveyed to the colonies extensive rights to the resources of the sea and seabed for wide distances in the Atlantic, generally to 100 miles. This reading of the charters accords with contemporaneous usage, with the objectives of the crown in chartering the colonies, and with prevailing English law and practice. It is confirmed, in addition, by contemporaneous documents construing the charters, by contemporaneous maps, and by extensive colonial practice involving the exploitation of ocean resources. This evidence, referred to below and elaborately documented in the Supplemental Brief and Appendix, is overwhelming.

The Master's disagreements with the States' evidence are, on individual examination, without merit. Further, his own assertions are vitiated by repeated reliance on selected secondary sources representing minority views inconsistent with the copious primary sources supporting the States' position, and by his misreading of *California* to render irrelevant the extensive historical evidence relating to law

and practice within the three-mile belt. The Master's reliance on several British and dominion decisions is demonstrably infirm when the actual opinions in those cases are examined.

3. At the Revolution the colonies became independent sovereign States and succeeded to all rights granted under the colonial charters, including rights to sea and seabed resources. In addition, the States inherited, as successors to the English crown, any residual interest of the crown in the sea and the seabed not previously granted, so that the States' ownership claims are established no matter how the earlier charters may be construed. Even if, contrary to historical fact, the States are not deemed to have been independent sovereigns, they unquestionably inherited colonial and crown rights to property, including seabed resources. State ownership of the sea and its resources is confirmed by the Peace of Paris and related maps and documents.

The Master is mistaken in his conclusion that any ownership rights of the States to the seabed were transferred to the federal government on ratification of the Constitution in 1789. Any such implied transfer is squarely inconsistent with Article IV, Section 3, of the Constitution, which prevents, and was expressly intended to prevent, any implied transfer of State property interests to the federal government. This Court rejected a comparable claim of implied transfer based on the admiralty jurisdiction (*United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818)), and its own subsequent decisions confirmed that the States are residuary owners of property including the lands lying below navigable waters. *E.g., Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

4. The Master ruled that the emergence of the three-mile limit in the period between 1789 and 1945 worked a contraction of any existing States' rights to the submerged lands,

and that the rights to the shelf now recognized under international law arose after 1945 on behalf of the federal government. The States, no less than the federal government, are entitled to have their rights measured by international law as it exists today, a position this Court itself adopted in *United States v. Louisiana, supra,* 363 U.S. at 33-34. In any event, an overwhelming preponderance of authority, including leading experts in international law, confirms that the three-mile limit related fundamentally to surface navigation and related rights; and its basic rationale could not affect the historic claims of the States to develop the mineral resources of the seabed.

5. Even if exclusive rights to the shelf are deemed to have arisen in 1945 for the first time, the States would be entitled to those rights. The States are unquestionably the residual owners of property within their land territories to which the continental-shelf rights are an "inherent" appurtenance. Alternatively, at the very least, the Atlantic States are entitled to prove their historic boundaries out to three leagues under the Submerged Lands Act, which would be unconstitutional if construed to deny them this right. Similarly, if the Act is read—contrary to Congress' recognized purpose—to deny the States property rights which they possess by historic title or otherwise, that statute would be *pro tanto* unconstitutional.

I.

NEITHER PRIOR DECISIONS OF THIS COURT NOR ANY PRINCIPLE OF CONSTITUTIONAL LAW FORECLOSES THE ATLANTIC STATES' RIGHT TO SEABED RESOURCES; AND STATE OWNERSHIP IS CONSISTENT WITH THE CONSTITUTION, THE HISTORIC UNDERSTANDING AND PRUDENTIAL CONSIDERATIONS.

A. *CALIFORNIA* AND SUBSEQUENT DECISIONS OF THIS COURT DID NOT ADJUDICATE THE RIGHTS OF THE ATLANTIC STATES AND DO NOT JUSTIFY A GRANT OF SUMMARY JUDGMENT AGAINST THEM.

It has been the position of the plaintiff from the outset that this case is controlled by *United States v. California*, 332 U.S. 19 (1947), and its progeny so that this Court and the Master were obliged to decide this case in its favor on the basis of statements made in these earlier decisions.[4] The Master accepted this argument and held that as a matter of law the plaintiff was entitled to summary judgment on its motion made originally in this Court and renewed before the Master (Report, p. 21).

The plaintiff's position has been that the decision of this Court in *California* rested on reasoning that "required" the Court to decide whether the Atlantic States had any rights in the seabed or resources beyond the low-water mark (Pl. Br., p. 10). Primarily, the plaintiff argued that *California* determined as a matter of historical fact that the Atlantic colonies and States never acquired ownership of the submerged lands or natural resources of the seabed seaward of the low-water mark (*id.* at 19). Plaintiff concluded that, as a result of *California*, the Supreme Court has "already resolved" adversely to the Atlantic States their contentions that they own the resources of the Atlantic seabed beyond territorial waters (*id.* at 10, 28).

[4] See Motion of the United States for Judgment and Brief in Support of Motion, pp. 21-24, 28-30; Post-Trial Brief for the United States Before the Special Master, pp. 8-16 (hereafter "Pl. Br.").

Taking a different route to the same destination, the Master agreed that judgment for the plaintiff should be granted as a matter of law based on *California*, but he adopted a somewhat different reading to sustain that view. He concluded that, primarily, *California* held as a matter of law that the seabed and its resources seaward of the low-water mark were affected by a "national concern for defense, international relations and foreign commerce" that made ownership of the resources attributes of federal external sovereignty rather than of State sovereignty (Report, pp. 12, 14, 21). Taking *California* to establish a rule of law, he declared it to be binding upon him, unless and until it was modified by the Court (*id.* at 10, 21).

Contrary to the arguments of the plaintiff and the conclusion of the Master, the issues in this case are in no way foreclosed by *California* or any other prior decision of this Court. First, it is common ground that this Court has never previously adjudicated the rights of the Atlantic States to the Atlantic seabed or its resources seaward of the low-water mark. This is in substance conceded both by the defendant (Pl. Br., p. 10) and by the Master (Report, p. 21). With exceptions not here relevant, it is well settled that a stranger to litigation is not concluded by its resolution of either factual or legal issues.[5] None of the Common Counsel States was a party to *California*.[6]

Second, the constitutional doctrine that the Master imputes to *California* has clearly been undermined, disap-

[5] Durkee v. Duke, 375 U.S. 106, 115-16 (1963); Sam Fox Publishing Co. v. United States, 366 U.S. 683, 690 (1961); Restatement, Judgments, §§ 68, 70, 93-1-1 (1942).

[6] In this connection, it should be noted that Massachusetts sought leave to intervene in the *California* case and the plaintiff, in successfully opposing that intervention, stated to the Court that "Massachusetts cannot be affected by any judgment which may be entered in that suit." Memorandum in Opposition to Motion of Massachusetts for Leave To Intervene, p. 1.

proved, and repudiated by subsequent developments that cannot be ignored. On the Master's view the seabed and seabed resources of the continental shelf were held in *California* to be so inextricably related to the plaintiff's constitutional functions of defense, foreign affairs and foreign commerce that federal ownership of the resources was a necessary attribute of those powers. We shall show below that both the Congress and this Court subsequently acknowledged that there is no such inseparable relationship, since the Submerged Lands Act, 43 U.S.C. § 1301, *et seq.*, sustained by this Court in *United States v. Louisiana*, 363 U.S. 1, 10 (1960), established the feasibility of separating federal constitutional powers from such ownership rights. See, *e.g.*, Section 6(a), 43 U.S.C. § 1314(a).

Even apart from these developments, we shall show that it cannot be plausibly maintained that the existence or exercise of federal constitutional powers requires federal ownership of seabed resources. Federal regulatory power is fully adequate to secure federal interests and no more requires plenary federal ownership of submerged lands than it requires that all property within the continental United States be owned by the federal government. If a contrary view is attributed to *California*, then reexamination of that view would certainly be warranted in light of the evidence adduced in this case. In point of fact, subsequent decisions of this Court clearly indicate that the Master's reading of *California*, as requiring federal ownership as a necessary attribute of federal power, is moot.

Third, apparently recognizing the weakness of such a constitutional argument, the plaintiff has chosen to read *California* as resting largely or exclusively upon a historical determination that the Atlantic States lacked property rights in the seabed or its resources seaward of the low-water mark on the Atlantic coast.[7] However, the Court's

[7] In its reply brief to the Master, the defendant went so far as to assert that *California* was "grounded in historical analysis" and that

analysis in *California* did not purport to make any definite determination that the Atlantic States lacked ownership rights in the seabed resources; it stated that on the materials available to it "we cannot say" that the thirteen original colonies "acquired ownership to the three-mile belt" and that neither charters, treaties "nor any other document to which we have been referred showed a purpose to set apart a three-mile ocean belt for colonial or state ownership." 332 U.S. 31-32. Since any historical judgment made by the Court in that case was specifically grounded on a lack of evidence, certainly *California* cannot be read to predetermine the result of a new inquiry made on the basis of a quite different record.[8] The Atlantic coastal States, which clearly are in the best position to supply evidence relating to their historic title, presented no evidence in *California* since they were not parties.

Moreover, as the statements quoted from *California* show, the historical issue posed by *California* in that case was entirely different from the historical issues posed here. California's "equal footing" argument led it to seek to establish that during the colonial and federal period the Atlantic coastal States were possessed of a uniform three-mile belt in the ocean along their respective coasts. Conversely, in rejecting the argument this Court emphasized the lack of uniformity in ocean-related claims in that period and the assertion of different types of American and foreign

the Court had not even suggested that the external sovereignty of the federal government was inseparable from seabed ownership (pp. 5, 148, 149).

[8] The plaintiff has asserted that certain of the documents introduced by the States in this case were also made available to the Court in *California*, but we believe that an examination of the testimony and evidentiary materials contained in the Appendix of the Common Counsel States will readily demonstrate that the evidentiary record made here goes far beyond the collection of references or documents supplied in *California*. It was precisely in order to compile such an evidentiary record that the States here, unlike California, sought a reference to a Master.

jurisdictional claims extending well beyond the three-mile limit. 332 U.S. at 32 & n.15. The Common Counsel States in this case have never claimed any such uniform three-mile belt as a matter of historic right; they agree that no such fixed, uniform belt existed in colonial times; and their claims derive from historical sources that have no relation to any supposed three-mile belt.

Finally, the assertion that *California* forecloses further consideration of the present case is inconsistent with this Court's own reference of this case to a Master. In its motion for judgment prior to the reference, the plaintiff made essentially the same arguments for foreclosure that it repeated to the Master in renewing its motion for judgment as a matter of law. The Common Counsel States argued in this Court, in opposition to granting the plaintiff's motion and in support of their own motion for reference to the Master, that the plaintiff's claim was invalid on the several grounds just described. We respectfully submit that this Court's reference of the case to the Master, leading to extensive evidentiary proceedings over several years, was not intended as an idle gesture or prelude to a grant of the plaintiff's motion but represented a rejection of the plaintiff's motion for judgment as a matter of law.

The Master, as his Report shows, regarded himself as bound by *California* to grant the plaintiff's motion for judgment, and his historical analysis was made with the explanation that it should be available in the event that the Court might decide to reconsider the rule of law assertedly established in the *California* case (Report, p. 21). Although for the reasons already stated we believe that the Master erred in believing himself controlled by *California*, there can be no dispute about his further observation: this Court is always free to reconsider its prior decisions, especially where great interests and constitutional principles are involved. Thus, even if the Master were right in his assumption that *California* dictated his result, the doctrine of that

case would be open to scrutiny here since there has been no prior adjudication of the claims of the Atlantic coastal States.

The Master's view that he was controlled by *California* is, however, not irrelevant in considering assertions made by him in subsequent portions of his Report. The Master readily concedes that he felt himself obliged to decide the case in favor of plaintiff whatever might be his own view of the situation (Report, pp. 9-10). With great respect we submit that this appraisal, which in our view is entirely mistaken, permeates the Master's Report. In particular, it makes it appropriate for this Court to give special attention to the actual record evidence in this case which is presented for its consideration. Thus, here, even more than in the usual original-jurisdiction case referred to a Master, "this Court has the duty of making an independent examination of the evidence." *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 470 (1945) (Stone, C.J., dissenting).

B. OWNERSHIP OF THE SEABED AND ITS RESOURCES IS NOT AN APPURTENANCE OF "EXTERNAL SOVEREIGNTY" NECESSARILY VESTED IN THE UNITED STATES.

The Master concluded in this case that "the most fundamental ground of the rule" in *California* was that federal power required federal ownership of the seabed and its resources. He described this "fundamental ground" as follows:

> "[T] he territorial sea is primarily affected by national concern for defense, international relations and foreign commerce, all of them being aspects of external sovereignty, the 'protection and control of which has been and is the function of national external sovereignty' [332 U.S. at p. 34], which in our federal union and under our Constitution is vested in the federal government to the exclusion of the states, and . . . an incident

> to that sovereignty is full dominion over the resources of the soil under the water of the territorial sea" (Report, p. 14).

Plaintiff has, as noted, sought to minimize or eclipse this asserted ground of decision; it prefers to read *California* as having rejected State claims on historical grounds and to have referred to federal powers merely to establish a federal title arising subsequent to the colonial period (*e.g.*, Pl. Br., p. 5). Like the plaintiff, the Common Counsel States believe that the references to federal powers and sovereign authority were not regarded as an independent ground for the Court's rejection of California's position, let alone the primary or fundamental ground gleaned by the Master.

If foreign-policy or defense considerations overrode an otherwise sound State title to seabed resources, the reasoning subsequently employed by the Court in *United States v. Texas*, 339 U.S. 707 (1950),[9] would be inexplicable. In that case, the Court held that Texas's claims were defeated by "equal footing" principles. If the Court had intended in *California* that foreign-policy or defense powers of the federal government necessarily required federal ownership of the submerged lands, then resort to equal-footing principles would have been quite unnecessary.

Nevertheless, the Master's reading of *California*, as well as certain oblique statements in that decision,[10] make it necessary to address at the outset and refute the

[9] Similarly, if federal sovereignty required federal ownership the Court could not subsequently have sustained the grants under the Submerged Lands Act of such resources to the States as it did in United States v. Louisiana, 363 U.S. 1, 10 (1960). See pp. 19-21, *infra*.

[10] The Court in *California* made reference to the necessity that "a government next to a sea must be able to protect itself from the dangers incident to its location"; it referred to the governmental interests in revenues, health, and neutrality; it took note of the possibility of international disputes and settlements concerning the resources of the

proposition that federal power granted by the Constitution makes necessary and inseparable federal ownership of seabed resources. With great respect, we submit that such a proposition cannot withstand rational examination. In addition, it cannot be squared either with the congressional judgment underlying the Submerged Lands Act or with this Court's action in sustaining that statute.

In substance, the Master reads *California* to say that because resources-development activity on the continental shelf may affect the military, diplomatic and commercial posture of the United States, it follows that the United States rather than the States must own the resources to be developed. The obvious and fatal difficulty with this view is that under this Court's decisions the federal government has preemptive regulatory power to regulate all activities — whether of States, corporations or individuals — to the full extent necessary to carry out its express responsibilities under the Constitution.[11]

Thus, the federal foreign-relations power overrides any State action that would create international problems, interfere with foreign policy or cause international embarassment; the defense power, properly executed by the federal government, gives the national government authority to control the deployment of all natural resources, wherever located, to insure the national defense; the treaty power allows the United States to make international

seabed, including "the very oil about which the state and nation here contend"; and the Court emphasized, as no one denies, that it is the federal government rather than the States that is entrusted with power over defense and foreign affairs. 332 U.S. at 35-36.

[11] *E.g.*, Tennessee v. Davis, 100 U.S. 257 (1879); Case v. Bowles, 327 U.S. 92 (1946); Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963).

agreements which supersede state law.[12] These and similar federal powers give the federal government full power to secure federal interests by treaties, legislation and regulation, including all legitimate interests affecting or affected by the development of submerged lands.

Such federal interests do not suggest, let alone require, federal *ownership* of submerged lands any more than they make it necessary for the federal government to own all property within the United States. Wars may be fought on land as well as by sea, and the resources of the land are no less vital to defense than those of the sea. Activities and property on land, no less than the resources of the seabed, may be and often are the subject of international dispute and settlement. No one has ever suggested, however, that federal ownership of all property within the United States was necessary for the national government to fulfill its defense, foreign-affairs, or commercial functions. "The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the nation." *United States v. California*, 332 U.S. 19, 42-43 (1947) (Reed, J., dissenting).

Before the Master the plaintiff argued that there are "legal and factual differences" between the land and sea which render the comparison inapt (*e.g.*, Pl. Br. 150). It has, however, never identified any difference that remotely qualifies or draws in question the power of the federal government to regulate, so far as is necessary to secure federal interests, any and all development activities undertaken by the States or State licensees in the submerged lands.[13] So long as this power exists, it is impossible to

[12] *E.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Missouri v. Holland, 252 U.S. 416 (1920).

[13] The only difference even adverted to by the plaintiff's reply brief is the extensive power enjoyed by the federal government over resident aliens within the United States and the more limited jurisdiction exercised over such persons beyond the territorial sea (Pl. Reply Br. 150). How this difference can have any bearing on the question of federal versus State ownership is not, and cannot be, explained.

conclude that State ownership can frustrate any legitimate interest of the federal government in defense policy, foreign affairs, or any other matter.

Our position that the existence and exercise of the federal government's powers over foreign policy, defense and commerce does not require ownership of the seabed and its resources has been accepted in substance by both Congress and this Court. In 1953, Congress enacted the Submerged Lands Act, by which it "recognized, confirmed, established, and vested in and assigned to" the coastal States the submerged lands and resources within a three-mile belt around the United States or, where a statutory historical test could be met by the Gulf States, a three-league belt in the Gulf. Sections 2, 4, 43 U.S.C. §§ 1301, 1311. The Act simultaneously reserved to the federal government a variety of rights including sovereign authority for purposes of commerce, navigation, national defense and international affairs. See, *e.g.*, Section 6(a), 43 U.S.C. §1314(a). Plainly, Congress saw no difficulty in separating federal sovereign powers from proprietary interests in the submerged lands.[14]

[14] Plaintiff's witness Professor Henkin conceded that no international problems or foreign-relations embarrassment have arisen from State ownership of the three-mile and three-league belts since 1953. Tr. 2647.

The plaintiff seeks to derive some comfort from the Submerged Lands Act by arguing that, at the very least, the companion Outer Continental Shelf Lands Act confirmed the claims of the United States to land lying beyond the three-mile/three-league limit (Pl. Br., pp. 16-18). See Sections 3-4, 43 U.S.C. §§ 1332-33. In fact, the Submerged Lands Act proceeded on the premise that the States' historic claims to adjacent submerged lands should be respected, and there is no expressed intent to cut off such claims as might extend beyond the three-mile/three-league limit. See pp. 136-37, *infra*. Congress also provided

Thereafter, in *Alabama v. Texas*, 347 U.S. 272 (1954), this Court sustained the validity of the Submerged Lands Act so far as it recognized State ownership of, and relinquished federal claims to, the three-mile/three-league belt, and the Court subsequently confirmed the claims of Florida and Texas to three leagues in the Gulf under the historical standard established by the Act. *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960). If, as the Master supposed, the *California* decision required federal ownership of the submerged lands as a necessary attribute of federal powers, then the Submerged Lands Act would not have been sustained by the Court and claims of Texas and Florida to the three leagues could not have been confirmed.[15] Consequently, either *California* did not rest on any ground of necessary federal ownership of the submerged lands or that that ground of *California* has been reconsidered and rejected *sub silentio*. In either event, the Master erred in concluding that there now exists any rule of law requiring, as a matter of constitutional principle, that the federal government own the resources of the seabed.

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in the Act that a provision approving and confirming a three-mile boundary for the original coastal States was without prejudice to the States' claim if any of their boundaries extend beyond that line. Section 4, 43 U.S.C. § 1312.

[15] The view that a majority of the Court did not read *California* as resting on any constitutional principle of necessary ownership is underlined by Mr. Justice Black's separate opinion in Alabama v. Texas. Mr. Justice Black—the author of the *California* decision—dissented from the Court's per curiam validation of the Submerged Lands Act, asserting that the case raised difficult and serious questions respecting Congress' right to relinquish "elements of national sovereignty" over the ocean. 347 U.S. at 279. Thereafter, in a separate opinion in the *Louisiana* case, Mr. Justice Black resolved his own doubts by expressly rejecting the federal government's argument that "the State's interest in the marginal seas must be determined in accord with the national policy of foreign relations." He stated that "[e]verything in the very extended congressional hearings and reports refutes any such idea." 363 U.S. at 90.

Testimony before Congress in enacting the Submerged Lands Act not only confirms that State ownership is compatible with federal power, but underlines the fact that Congress explicitly made this judgment in framing the Act. A striking example, noted by the Court in its own *Louisiana* opinion, involved the contention that the federal government might be embarrassed in its diplomatic relations by permitting States to exercise rights in submerged lands beyond three miles, as the Act clearly contemplated in the case of Gulf States meeting the Act's historical test. Mr. Justice Harlan's opinion for the Court explained:

> "The first objection was laid to rest by the testimony of Jack B. Tate, Deputy Legal Advisor to the State Department. Mr. Tate stated that exploitation of submerged lands involved a jurisdiction of a very special and limited character, and he assured the Committee that assertion of such a jurisdiction beyond three miles would not conflict with international law or the traditional United States position on the extent of territorial waters. He concluded that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve." 363 U.S. at 30-31.

Other testimony similarly confirmed that there was no inconsistency between State ownership and any of the federal powers referred to in the *California* case.[16]

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[16] For example, the Secretary of the Navy, Robert B. Anderson, made it clear that it was not necessary in relation to federal defense

At the hearing before the Master, the Common Counsel States introduced the testimony of a highly qualified expert witness—Lyman B. Kirkpatrick, Jr.[17]—to confirm that the functions of the federal government in defense, foreign relations, and allied fields do not require federal ownership of the submerged lands. Mr. Kirkpatrick reviewed the history of this country's claims over the continental shelf vis-a-vis foreign nations and the distinction repeatedly drawn by the federal government itself between that question and the separate question of federal versus State ownership. He explained in detail how the foreign-relations and defense powers of the federal government were adequate to protect its legitimate interests regardless of State ownership of the submerged lands (App. 4-10).

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policy for the United States rather than the States to own petroleum resources of the seabed. He testified:

> "Senator Long: Do you see any impediment to obtaining oil in time of national emergency by virtue of private or State ownership of some of that land on which the oil is located?
>
> "Secretary Anderson: No, sir.
>
> "Senator Long: Is private industry going to produce oil regardless of whether the oil is under State ownership or privately owned lands or federally owned lands?
>
> "Secretary Anderson: I certainly assume it would, Senator."

Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and Other Bills, 83d Cong., 1st Sess. 560 (1953).

[17] Mr. Kirkpatrick, currently a University Professor at Brown University specializing in political science, has been connected with foreign relations and defense policy throughout his professional life. He assisted in the formation of the Central Intelligence Agency and served both as its ranking official responsible for intelligence and as its Inspector General. He has written on military affairs and lectured regularly to the State Department's Foreign Service Institute and the Army War College. App. 1-4.

In addition, Mr. Kirkpatrick noted that petroleum exploration will almost certainly be carried on by private parties whether they are licensed by the federal government or the States (App. 10). To be sure, disputes may arise with foreign countries concerning the continental shelf and treaties may be made between this country and others on this subject. However, he noted that such disputes are scarcely more remarkable than those that arise regularly "respecting American vessels in foreign ports, American property in foreign countries, and property subject to contract between Americans and foreign nationals" (App. 9). Similarly, State ownership cannot block any proper treaty the federal government may promote or adopt to govern the seabed (App. 10-11).[18]

Against this background, it is unnecessary to argue at greater length that State claims to ownership of submerged lands are compatible with the existence and exercise of federal constitutional powers. This compatibility has been acknowledged explicitly by Congress in the Submerged Lands Act and, at least implicitly, by this Court's subsequent decisions sustaining and applying the statute. The plaintiff in this very case appears to renounce any reliance on a supposed inseparability of federal power and ownership of the submerged lands (*e.g.*, P1. Post-Hearing Reply Br. 148-49). So far as the Master has relied upon a contrary reading of *California*. his Report errs and must be disaffirmed.

Certainly there can be no suggestion that, as a matter of constitutional law or policy, State ownership is permissible

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[18] Mr. Kirkpatrick gave similar testimony relating to military aspects of the sea, seabed, and development of seabed resources (App. 15-18). He noted that ownership of the three-mile belt immediately adjacent to the coasts has been confirmed in the States even though it is "the area of the sea frontier traditionally regarded as most critical to the defense of the United States" (App. 17).

within a three-mile belt but not beyond. Both Texas and Florida have already been allowed greater distances. In any event, the significance of the Submerged Lands Act is not the precise distance it fixes, but rather its recognition that federal powers over defense, foreign relations, and commerce can be distinguished from any question of ownership and amply exercised even though ownership be confirmed in the States. As a matter of reason, the same rationale must apply fully beyond the three-mile/three-league limit.

C. STATE OWNERSHIP OF THE SUBMERGED LANDS IS CONSISTENT WITH THE CONSTITUTIONAL FRAMEWORK, COMMON UNDERSTANDING DURING MOST OF OUR HISTORY, AND COMPELLING STATE ECONOMIC AND REGULATORY INTERESTS.

Federal ownership of the seabed and its resources is not only unnecessary under the Constitution but is contrary to the spirit and approach of the Constitution which makes the States the residuary owners of public lands otherwise unallocated. State ownership of the submerged lands is reinforced both by the common understanding from the outset of our history as a nation and by the regulatory and economic interests of the coastal States in relation to submerged lands. In short, the constitutional presumption strongly supports the States' claims in the present case.

A basic constitutional principle of the union is that the federal government is one of granted or delegated powers, while the States and their citizens are the residuary possessors of all sovereign powers and rights not ceded to the federal government. This proposition respecting the allocation of powers is so well settled that extensive citation is unnecessary.[19] The proposition is no less true with respect to property.

[19] See U.S. Const., Xth Amend.; United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Knapp v. Schweitzer, 357 U.S. 371 (1958).

The caution of the framers of the Constitution in reserving property to the States and limiting federal acquisitions is striking. Article I, Section 8 gives Congress power over a federal district for the seat of government and over all places purchased for forts, dock yards, magazines, arsenals, and other buildings, but requires that all such property be obtained only with the consent of the legislatures of the States in question. Article IV, Section 3 provides that no State shall be formed by Congress within the jurisdiction of any other State or States without the consent of the States involved. The second clause of the article also states that nothing in the Constitution "shall be so construed as to Prejudice any Claims of the United States, or of any particular State" to any property or territory, a clear attempt to negate the possibility of any implied transfer.

Thus, the very capital of the nation and the locations of its military facilities were to be lands possessed by the States and transferred only with their consents. Grants of land were, in fact, made by individual States during our early history in order to foster national interests. See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221-23 (1845). Obviously the framers did not conceive that it was "necessary" to the exercise of granted federal powers that the federal government possess by implied transfer any property then belonging to the States. More important, the framers assumed that the States would continue after the Constitution to possess the public properties which had previously been theirs.

The decisions of this Court were, throughout the nineteenth century, consistent with the view that the States retained ownership of, and regulatory authority over, their lands and resources, whether or not the lands were submerged. In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), submerged lands exploited for oyster fisheries were held to have been inherited by the State involved. In the *Pollard*

case, the Court confirmed the rights of the States, rather than the federal government, to ownership of submerged lands lying below navigable waters. In *Manchester v. Massachusetts*, 139 U.S. 240, 264 (1891), the Court sustained the right of Massachusetts to regulate fishing in connection with its "territorial jurisdiction . . . over the sea adjacent to its coast . . ."

Throughout this country's history, at least down to the *California* decision in 1945, the evidence shows that it has invariably been understood and assumed that the States were the residuary owners of property within their historical boundaries, beneath their waters, or adjacent to their coasts. This view conformed to the historical origins of State title and boundary claims, since the original colonial charters conveyed rights in the broadest possible terms; for example, the New England charter of 1620, discussed below at pp. 69-71, conveyed gold, silver and other "mine and Minerals" both within the designated "Tract of Land" and also "within said Islands and Seas adjoining." Maps during the colonial period confirmed the maritime territory granted to the governments which ultimately became our States.

It cannot reasonably be questioned that at the time of *California* it was widely and emphatically believed that the States owned the submerged coastal lands. This Court itself conceded in the *California* decision that its earlier cases indicated that "the Court then believed that states not only owned tidelands and soils under all navigable waters within their territorial jurisdiction, whether inland or not." 332 U.S. at 36. The basic rule that the States owned land under navigable waters was framed, understood and applied without any suggestion that a distinction was to be drawn between inland waters and the sea, and such a distinction would have been without any legal or historical foundation. See pp. 104-12, *infra*.

It should be emphasized that, as the legislative history shows, Congress regarded itself as restoring the status quo ante when in 1953 it passed the Submerged Lands Act and reconfirmed the States' ownership within the three-mile/three-league belt. For example, in one of the pertinent legislative reports (H.R. Rep. No. 1778, 80th Cong., 2d Sess. 1-2 (1948), the legislation that evolved into the Submerged Lands Act was explained as follows:

> "[T]he aforementioned bills [were] introduced in the Congress to preserve the status quo as it was thought to be prior to the California decision . . . to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries. . . . The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law."

Another report referred not only to Supreme Court decisions but to the understanding of the legal profession, the authors of leading treatises, and the belief of the lower federal court and State-supreme-court jurists "as reflected in more than 200 opinions." S. Rep. No. 1592, 80th Cong., 2d Sess. 17-18 (1948).

The long-standing exercise of State regulatory powers over the adjacent sea and its resources reinforces the presumption in favor of the States' claims in this litigation. Such regulation, extending back to colonial times, involved

extensive regulation of fishing, including sedentary fisheries in the marginal sea, the seabed resource most amenable to exploitation in the period before the advanced technology of the industrial revolution. Indeed, in *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906), this Court made reference to "the sway of the riparian States" over "the maritime belts" which allows the States to "reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber or other products of the sea."[20]

State regulation has not only subsisted for many years but has been recognized and endorsed by this Court. The cases include older ones, of course, such as *Louisiana v. Mississippi, supra*, and *Manchester v. Massachusetts, supra;* but they also include comparatively recent ones such as *Skiriotes v. Florida*, 313 U.S. 69 (1941), affirming Florida's right to regulate sponge fishing in the Gulf, and *Askew v. American Waterways Operators*, 411 U.S. 325 (1973), sustaining Florida legislation concerning off-shore oil pollution.

State activity in the marginal sea was not limited to economic regulation. The States leased sedentary fisheries in the marginal sea (S.B. 379-80); they enacted statutes affecting title to the seabed; and they repeatedly executed deeds of portions of the seabed to the federal government, grants which the federal government accepted after receiving formal opinions from federal and State counsel confirming the State's title (S.B. 380). Extensive improvements, such as wharves and other fixed facilities, were of course regularly made by the States or under their auspices on the assumption that the States had title to the seabed (*ibid.*).

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[20] The evidence of State regulation of fishing and other marginal-sea activity is supported by evidence so extensive that we assume it will not be challenged by the plaintiff.

Whereas the interests of the United States in the continental shelf are discrete ones involving specific, defined federal powers, the regulatory interests of the States are broad ranging and comprehensive; they include any matter that might touch upon the ordinary and historic police powers of the State. Congress endorsed this view in the Outer Continental Shelf Lands Act when it adopted the civil and criminal laws of each adjacent state, so long as not inconsistent with any federal statute or regulation, to govern the submerged lands of the outer continental shelf lying beyond the three-mile/three-league line. See Section 4(a)(2), 43 U.S.C. § 1333 (2)(2). See also *United States v. Louisiana*, 339 U.S. 699, 740 (1950).

Equally important, the coastal States' interests are intimately linked to resource development and its economic burdens and benefits in a way that the interests of the federal government can never be. For example, when an extensive offshore drilling for petroleum or natural gas occurs, it is the adjacent coastal State that bears the economic burdens of population shifts into the affected coastal regions and the enormous costs of increased policy, road-building, schools and other social improvements. *Cf.* Council on Environmental Quality, *OCS Oil and Gas—An Environmental Assessment* (April 1974), pp. 7-31. It is, of course, State revenues that must be raised to pay for such activities and projects.

Similarly, the environmental impact of off-shore resource development is a matter of critical importance to the adjacent States and their economies. Oil spills, for instance, have their immediate economic impact on recreation, fishing, tourism, and related industries that may be important or vital to the affected State. See generally *Askew v. American Waterways Operators, su-*

pra, 411 U.S. at 333-34.[21] The same economic burden will be felt by the State whether its beaches or fisheries are imperiled by an oil well accident occurring two miles from shore or ten miles. It is, correspondingly, the State to which the direct revenues from off-shore production are essential both to provide the infrastructure that makes such development possible and to compensate for the inevitable losses that development must cause to the other economic activities on which the State's citizens depend.

II.

UNDER ENGLISH AND INTERNATIONAL LAW AND PRACTICE PRIOR TO 1776, THE MARGINAL SEAS WERE SUBJECT TO THE SOVEREIGNTY OF THE ENGLISH CROWN, AND THE RESOURCES OF THE SEAS AND SEABED BELONGED TO THE CROWN IN PROPERTY.

A. ENGLISH LAW AND PRACTICE PRIOR TO THE 17TH CENTURY RECOGNIZED THE SOVEREIGNTY AND OWNERSHIP BY THE CROWN OF THE ENGLISH SEAS AND THE RESOURCES THEREOF.

The Master found that prior to 1603 the only crown right recognized by English law in the adjacent seas was the right

[21] In *Askew*, the Court quoted one expert as follows:

> "Perhaps the most noticeable damage caused by oil pollution is the fouling of recreational beaches and shore-front property. One-half million tons of oil are washed ashore each year, rendering beaches unfit for swimming and filling the air with unpleasant odors . . . . It is estimated, for example, that a serious oil spill off Long Island during the summer months would cost resort and beach operators thirty million dollars. Oil spills also create navigational and fire hazards in harbors, ports and marinas."

to protect navigation against piracy, and that English law did not recognize either territorial sovereignty or rights of ownership in those seas (Report, pp. 27-29, 75 §§ 1, 2, 6). The record is to the contrary.

1. The Record Massively Supports the States' Position.

The evidence is conclusive that long prior to 1603 the four seas surrounding England[22] were consistently regarded as part of the realm of England, under the full territorial sovereignty and jurisdiction of the crown (S.B. 8-18). One of plaintiff's own witnesses admitted that this was the necessary meaning of a 14th-century statute referring to "the sea or elsewhere within the realm" (S.B. 11; App. 545). The same conclusion follows from another statute which, as properly translated, excluded the admiralty jurisdiction from "anything done within the realm, except things done upon the sea" (S.B. 14-18). Plentiful additional evidence requires the same conclusion. English maritime sovereignty during this early period is evidenced both by "a great body of state practice" and "some considerable comment on it by observers" (App. 698; see also App. 650-55, 658-59).

It followed from English maritime sovereignty that England had jurisdiction, legislative and administrative as well as judicial, to regulate navigation through and conduct in the English seas, both by nationals and by foreigners (S.B. 8-9, 25-31, 39). The best authorities recognize that this jurisdiction was far from limited to protection from pirates, as the Master concluded; rather the English rights of sovereignty and dominion in the sea were regarded as entailing the duty of protection as a corollary (S.B. 9-10). The admiralty jurisdiction was squarely founded on the "sovereign lordship of the Kings of England" over the "sea

[22] The entire North Sea to the east, the entire English Channel and Bay of Biscay to the south, and portions of the ocean to the north and west generally defined as extending 100 miles from the coast. See, *e.g.*, App. 824-27; pp. 47-49, 56-57, *infra*.

of England" and was exclusive within those waters (S.B. 25); the sea was "a district of the Kingdom" (S.B. 27).[23] As a recognition of English sovereignty in the English seas, foreign ships were required when in those seas to strike their sails to English ships (the "flag salute"), and the failure to do so was punished as a criminal offense (S.B. 8, 13, 30).

The English maritime jurisdiction, both asserted in law and habitually exercised in fact, encompassed not only the punishment of piracy but also the making and enforcement of substantive law of every type and the control and disposition of property rights, including the grant of exclusive fisheries, both surface and sedentary; the exclusion, taxing or licensing of foreign navigation and fishing, and regulation of the time, manner and extent of fishing for conservation and other purposes (S.B. 18-25, 28-31). Plaintiff's witness on mediaeval law conceded that the crown asserted and exercised the right to grant exclusive fisheries in the English seas (App. 545).[24] The crown's rights to royal fish, flotsam, jetsam and lagan were squarely based on maritime territorial sovereignty and were deemed coextensive with the seas which were part of the realm (S.B. 10-12).

[23] The admiralty jurisdiction included both the definition and the punishment of criminal offenses on the English seas, by foreigners as well as by English subjects, with no distinction between piracy and other crimes (S.B. 25-31).

[24] While the Master relies heavily on the fact that at some periods the English crown permitted fishing by certain classes of foreigners without charge in the English seas, such permission is in no way inconsistent with the assertion of sovereign rights which included the prohibition or taxing of such fishing if and when the crown so chose (S.B. 23-24). England asserted and frequently exercised the right to exclude or to tax foreign fishermen when it wished (S.B. 23-25), as plaintiff's witness on mediaeval law conceded (App. 544).

The record demonstrates, also, that English law prior to 1603 fully recognized crown ownership of the seabed under the marginal seas and the resources thereof (S.B. 31-33). This is evidenced by, among other things, royal grants of title to sedentary fisheries and of title to surface fisheries which depended on the exclusive right to use the seabed for weirs or other devices (*ibid.*). In the reign of Edward III it was declared "that not only the dominion of the sea, but the very soil, belongeth unto the King," and many early decided cases are founded on that ownership (S.B. 32). English law, contrary to Roman law, held that a new island rising in the English sea belongs to the crown, and that doctrine was based on the principle that the crown had owned the land while still covered with water (S.B. 13; Tr. 325).

When during the reign of Elizabeth I Thomas Diggs formulated a systematic theory of crown ownership of the foreshore, he took crown ownership of the sea and seabed as well established and noncontroversial (S.B. 36-37). The record is clear, and plaintiff's witness conceded, that Queen Elizabeth's government fully subscribed to and implemented Diggs' doctrines (S.B. 38; App. 28-29). Other Elizabethan writers of great eminence and influence, including Gentili and Dee, described a fully developed law of territorial waters, 100 miles wide at a minimum, in which full maritime sovereignty and dominion were exercised (App. 804-05, 812-13; S.B. 35-36).

The Master relied heavily (Report, pp. 26-27) on a statement by Queen Elizabeth in 1580 that the ocean is free to all. Elizabeth was rebutting the Spanish claim (S.B. 267) that all the oceans of the world had been divided between Spain and Portugal,[25] and that even innocent passage of foreign ships through those oceans was solely at Spain's

[25] The statement was made in response to a complaint by the Spanish ambassador against Sir Francis Drake's navigating through the Pacific Ocean. 1 Oppenheim, International Law 584 (8th ed. Lauterpacht 1955).

sufferance. She was plainly referring to open or high seas far from any coast, not to the more limited areas, such as the English seas as traditionally defined, which overlie the continental shelf. Many actions by Elizabeth and her governments demonstrate adherence to and enforcement of the traditional English doctrine of maritime sovereignty and dominion, including the flag salute and the requirement that anyone wishing to navigate through the English seas first secure her permission (S.B. 8, 34; see generally S.B. 33-45).

Indeed it is during Elizabeth's reign that we find the first evidence that the marginal seas in North America were, like the English seas, to be regarded as subject to English sovereignty, dominion and exclusive fishing. In accordance with the law of monopolies which was developed during Elizabeth's reign (S.B. 39-43),[26] the earliest letters patent for American colonization conveyed monopolies of fishing and other maritime "royalties" in the seas of the areas to be discovered and settled (S.B. 41-43). These patents were promptly implemented, foreign fishermen being excluded from the rich American fisheries as soon as the English were in possession of the adjacent land (S.B. 43-45; App. 832-33). Thus the full development in the 17th century of English maritime sovereignty and dominion was no new and ephemeral creation resulting from the Stuart succession and dying with it. Indeed, the extension of that English law and practice to the marginal seas of the new English discoveries and settlements in North America was both implicit and explicit from the very beginning of that enterprise, before the first Stuart came to the throne.

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[26] The rule, formulated by Sir Edward Coke when Attorney General, was that a royally created monopoly was valid if it involved a new discovery, venture or economic opportunity, in the seas or on land, but not if it attempted to exclude Englishmen from particular economic activities in places where they had previously engaged in them. S.B. 39-43.

2. The Master's Erroneous Methodology Undermines His Determination.

A principal reason for the Master's error on this as well as other points involves an astonishingly unsound approach to historical methodology which pervades his discussion of English law and practice both before and after 1603. The Master paid an extraordinary deference to one of the many secondary sources which have figured largely in this litigation: T.W. Fulton's book *The Sovereignty of the Sea* (1911). The Master goes so far as to say he has "tested the evidence and exhibits" (including innumerable primary sources) by whether they coincide with Fulton's views (Report, p. 25). Obviously, the opposite approach is the correct one; secondary sources must be tested by the primary evidence.

Fulton is a significant source, and in many respects supports the States' case here. The controversial aspects of the Master's reliance on Fulton relate mainly to two points: the claim that English law prior to 1603 failed to recognize maritime sovereignty and dominion, and the claim that the admitted 17-century legal recognition thereof vanished after 1688.

On these two points, Fulton is sharply at variance both with the evidence introduced herein, including the primary authorities, and with the weight of scholarship in all periods. Fulton's was a frankly revisionist book, designed to refute what all earlier writers had believed about the traditional, and continuing, English law and practice (App. 104-05). It was, moreover, written at the height of popularity of freedom-of-the-seas doctrine with respect to navigation, a doctrine of which Fulton was a zealous advocate. Any random excursion through Fulton's pages will make it apparent to an impartial mind that Fulton's tone and argument are distinctly partisan. Fulton was not a lawyer—his book refers to him as "lecturer on the scientific

study of fishery problems, University of Aberdeen"—and had no comprehension of the legal significance of many of the historical events which he treats. His study is not a law book, but a political history with an axe to grind.

Moreover, later and better-qualified writers have not accepted Fulton's controversial theories. Elder, Potter, Fenn, O'Connell and many others have found the traditional view of English law respecting maritime sovereignty and dominion far more historically accurate than Fulton's attempted revision. (See S.B. 8-10, 71, 124, 265-66; App. 105, 658-59, 695-701.) Fenn, for example, is immeasurably more sophisticated and knowledgeable in analyzing mediaeval law and practice, and arrives at conclusions sharply opposed to Fulton's (S.B. 272; App. 791-818). Similarly, O'Connell has made a far more careful analysis of post-1688 law and practice, and again vigorously disputes Fulton's views (pp. 56, 60, *infra*). Plainly it is unsound scholarship to take one rather dated secondary source as gospel on points where he is refuted by later and better authority, not to speak of the massive primary-source documentation which has been introduced herein.

Even aside from Fulton, the Master relies almost entirely on other secondary sources to establish English and international law of the 17th and 18th centuries, notwithstanding the fact that the record makes the relevant primary sources fully available. Where secondary sources are refuted by the primary evidence, reliance on the former is plain error. The Master's report is replete with unwillingness to accept the obvious proposition that the best evidence for the law of a particular historical period is what the courts, other law-giving authorities and commentators of that period said it was.

3. The Master's Misconception of the Issues Led Him To Ignore Much of the Relevant Evidence.

Another error infecting the Master's discussion of pre-17th century practice—and pervading the Master's historical analysis throughout the entire Report—is that he discounted as irrelevant all the evidence in the record demonstrating the assertion and exercise by the English, colonial and State governments of sovereignty and dominion in the marginal seas and seabed close to the shore, on the ground that the areas in question were or may have been within three miles of the coast. The Master's theory was that the three-mile belt is not at issue in this litigation, since because of the "gift" by Congress in the Submerged Lands Act it is conceded that the States own that belt (Report, pp. 24-25, 56, 80 § 25). The Master's approach is demonstrably unsound in several critical respects.

California focused upon a lack of evidence in the record in that case to establish a uniform three-mile belt in colonial times; see pp. 13-14, *supra*. The Common Counsel States in this case do not assert that any such uniform belt arose prior to the 18th century; they show instead that, when it did arise, it represented a curtailment of a broader right of sovereignty and dominion previously recognized in English and international law; see pp. 58-60, 113-16, *infra*. Even more important, a fundamental question presented in this case is the soundness of *California's* historical holding so far as it may be read to negate any offshore colonial or State ownership claims in the 17th and 18th centuries. Any evidence logically pertinent to this inquiry must be weighed on its merits and not discounted in advance.

Given the state of technology prior to recent times, it is natural that much—though by no means all—of the historical evidence showing the assertion and exercise of maritime sovereignty and dominion relates to areas fairly

close to shore, where exploitation was feasible. Prior to, at the earliest, the very end of the 18th century, neither English nor international law made any legal distinction between a three-mile belt and the adjacent seas beyond three miles; no one had ever heard of a three-mile limit. Thus evidence regarding maritime sovereignty and dominion prior to the formation of the union, to whatever distance offshore, is highly relevant in refuting any assumption imputed to *California* that prior to acceptance of the three-mile limit maritime sovereignty and dominion stopped at the low-water mark.[27]

No balanced and impartial scrutiny of the evidence can escape the conclusion that, long prior to 1603, English law and practice consistently recognized extensive rights of sovereignty and dominion in the marginal seas which included the right here at issue: the exclusive right to exploit seabed resources. The state of the law both with respect to areas where seabed exploitation was then feasible and on analogous subjects, such as surface fisheries, islands rising in the sea and derelict lands, made it wholly clear that exploitable resources anywhere on the bed of the English seas would have been claimed by the crown instantly upon their discovery and that the claim would have been legally sustained.

B. ENGLISH LAW AND PRACTICE DURING THE 17TH CENTURY, THE PERIOD OF THE COLONIAL CHARTERS, FULLY RECOGNIZED THE CROWN'S SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS AND SEABED; AND NOTHING IN INTERNATIONAL LAW WAS TO THE CONTRARY.

During the reign of James I (1603-25) and thereafter,

[27] Likewise, post-1787 evidence of State assertion and exercise of sovereignty and dominion within the three-mile belt is relevant in refuting *California's* alleged holding that since the formation of the union whatever rights of sovereignty and dominion have existed in the marginal seas belong to the federal government.

English law and practice unequivocally affirmed the rights of sovereignty and property of the crown in the adjoining seas. The English seas were regarded as part of the realm, just as much as the land, and therefore subject to the legislative, executive and judicial power of the state. The crown possessed and exercised the right to exclude or to license foreign fishermen and the right of admiralty jurisdiction, both civil and criminal, including criminal jurisdiction over foreigners for crimes committed in the English seas.

The English seas were regarded on historical grounds as extending all the way across both the North Sea and the English Channel, and for considerable distances into the Atlantic. Except where special circumstances operated (as in the English Channel, all of which was claimed on the basis of the English kings' claim to the French throne), the usual doctrine was that English sovereignty extended for 100 miles. Within the English seas, the right to the fisheries was exclusive, and the crown had and constantly exercised full rights of regulation, control and licensing of the fisheries. The admiralty jurisdiction was territorial in the English seas, and the flag salute was required for foreign ships in those seas. As to the seabed and subsoil, the law of England was that the crown owned them and the resources thereof.

The overwhelming body of evidence supporting these conclusions is summarized at S.B. 47-124. The facts were largely conceded by plaintiff's witnesses and by the Master. To the extent the Master disagreed, he is refuted by the record.

1. The English Seas Were Within the Realm of England.

The Master denies (Report, p. 35) that English law deemed the English seas to be part of the realm of England

or under the territorial sovereignty of the English crown (though he concedes that they were under the crown's "dominion," *ibid.*). For that proposition the Master relies on a single unofficial authority—Sir Henry Finch in 1613—whose brief discussion of the matter is quoted in full at S.B. 69. Even Finch does not support the Master's conclusion.

Finch identified the term "realm" with the bodies of counties, which end at low-water mark. But he plainly did not believe that the territorial sovereignty of the English crown was limited to the "realm" in that narrow sense, since in the same sentence he declares that Scotland, Wales and Ireland are not within the realm either. Finch's sole concern in the passage in question was the territorial extent of the jurisdiction of the English common-law courts, not a definition of those areas over which the crown held territorial sovereignty.

Finch, moreover, is the *only* 17th-century authority who is even faintly ambiguous on this score. The massive evidence summarized at S.B. 48-73, and excerpted at App. 31-40, 46-48, 91, 93, 647-50, 655-56, 667-68, 674-77, 697, 712-15, 721, 726, 731, 739-40, 777-83, 854, 897-98, demonstrates the overwhelming consensus throughout the 17th century that the crown possessed territorial sovereignty over the English seas as full and complete as over the land of England itself. The evidence includes judicial decisions, notably the famous *Ship Money Case* in 1637 (S.B. 49-54). Acts of Parliament (S.B. 55-56), several official opinions of the law officers of the crown (S.B. 56-58), and other official pronouncements and governmental acts having legal force (S.B. 58-60) were unambiguously to the same effect. This English maritime sovereignty was recognized on a number of occasions by foreign nations, by treaty and otherwise (S.B. 72-73). The same principle was unequivocally expounded by every 17th-century English legal commentator we have found who discussed the issue except Finch—at

least 13 of them (S.B. 61-69), including the three most influential, Coke, Selden and Hale.[28]

2. The 17th-Century English Admiralty Jurisdiction in the English Seas Was a Territorial Jurisdiction.

The Master disputes (pp. 31-33, 75 § 5) the unanimous opinion of every 17th-century English legal authority that the admiralty jurisdiction in the English seas was a territorial, not a personal, jurisdiction. We rely on the territorial nature of the jurisdiction because it confirms the crown's territorial sovereignty in the seas and because the jurisdiction encompassed the exclusion of foreigners from unlicensed exploitation of maritime resources.

The evidence showing the unanimous agreement of 17th-century courts, officials and legal authorities that the admiralty jurisdiction in the English seas was founded on the crown's sovereignty in those seas is summarized at S.B. 92-98 and, with respect to the insistence on the flag salute as an attribute of sovereignty, at S.B. 117-20. Among the clearest evidence are the charges of the famous admiralty judge Jenkins to admiralty juries, App. 894-903. Jenkins squarely based the admiralty jurisdiction upon, and deemed it coextensive with, the "sovereignty of our kings in the British ocean" (App. 895). No distinction is made between English subjects and foreigners with respect to the activities in the English seas which are to be investigated. Foreigners are singled out for special scrutiny and prosecution with respect to the crimes of fishing in the English seas without license and refusal to give the flag

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[28] Merely as one example, Coke declared that "if a man be upon the sea of England, he is within the kingdom or realm of England and within the legeance of the King of England, as of his crown of England" (App. 655; S.B. 65). Every modern commentator, including Fulton, is to the same effect (S.B. 70-72; App. 810).

salute (App. 896). A clear distinction is made between the territorial jurisdiction of the admiralty in the four English seas, which is exclusive, and the non-territorial jurisdiction over piracy anywhere in the world, which is non-exclusive (App. 897-99; see also App. 675). The admiralty enforced the various statutes and ordinances regulating exploitation of maritime resources, both surface and seabed (App. 903).

Further, conclusive evidence at App. 721-38 shows the indictment, trial and conviction of a number of foreigners for crimes other than piracy (*i.e.*, failure to give the flag salute) committed in the English seas. The indictments flatly recited that the British seas are "within the sovereignty and of the dominion of the kings of England . . . as a parcel of the Kingdom of England" (App. 721, 731). Since these indictments were found legally sufficient and resulted in convictions, they are unimpeachable authority.

The Master appears to contend that the admiralty jurisdiction, even if territorial, was somewhat more limited than English jurisdiction on land, in that it did not include such crimes as the murder of one foreigner by another on board a foreign vessel (Report, pp. 31-32). But for the purpose of this litigation that question is academic: no one familiar with the evidence can doubt, and the Master nowhere denies, that the jurisdiction would have been instantly applied to a foreigner seeking to extract minerals from the seabed of the English seas. That is wholly sufficient to sustain the States' claim here. The States need not show historical precedents for sovereignty or dominion over the sea going beyond the rights at issue here.[29]

[29] As to the irrelevant question of jurisdiction over internal affairs of a foreign ship, with no English persons or interests involved, it is hardly surprising that such incidents are not found; the English authorities would probably not even know of such a crime. Moreover, during this period the right of innocent passage of foreign ships was generally recognized as a qualification on full maritime territorial sovereignty (S.B. 120-21; App. 815-16, 850), just as it is today. That right entails immunity of a foreign ship from the jurisdiction of the territorial state so long as the acts in question have no effect outside the ship; the ship is regarded as part of the territory of the sovereign of its flag, and carries its own territoriality with it—again so long as no effects outside the ship are produced. *E.g.*, 4 Whiteman (U.S. Dept. of State), Digest of International Law, 11, 387, 400-01 (1965); 6 *id.* at 93 (1968); 9 *id.* at 67-71 (1968). No one questions that, for these reasons, United States courts today have no jurisdiction over a murder on board a foreign ship even in territorial waters, let alone in the waters overlying the continental shelf. Yet no one contends that that limitation means that the three-mile belt is not territorial or that continental-shelf resources are not subject to the exclusive right of national exploitation.

The Master relied on Justice Cockburn's 19th-century opinion in *Queen v. Keyn* for the proposition that 17th-century English admiralty courts had no jurisdiction over foreigners. While Justice Cockburn's treatment of the admiralty cases he did treat was highly questionable (App. 53-58), the conclusive refutation to Cockburn is found in the cases at App. 721-38, of which he was apparently unaware. See also App. 56-57. In any event, there cannot be the slightest doubt that every 17th-century authority, judicial, official and unofficial, regarded the admiralty jurisdiction as territorial and as extending to foreigners at least whenever foreign activity in the English seas impinged on English interests, as any attempt to exploit seabed resources would obviously have done.[30]

Finally, the Master claims that in the treaty of 1674 it was agreed that the Dutch would accord the flag salute "merely as a ceremony of honor and a testimony of respect

[30] While the Master may believe (Report, p. 32 n.) that the 17th-century statement to this effect by Lord Hale (Chief Justice of England and the leading authority on maritime law) was not supported by the evidence from even earlier centuries which Hale cited, that surely is not the point: the Master is not expounding 17th-century law, but quarreling with it. Hale, Selden, and others, plus the primary legal evidence mentioned above, simply leave no doubt as to what that law was.

to the English crown" (Report, p. 23). The treaty acknowledges "the right" of the English king "to have honour paid to his flag . . . in the same manner, and with the like testimony of respect, as has usually been paid" in the seas whose boundaries were specified, and declares that the Dutch were "justly acknowledging" that right (13 Parry, *Consolidated Treaty Series* 133, 134-35). It is quite true that the Dutch never admitted English territorial sovereignty in the English seas or that the flag salute was a corollary of it; the question here is what the law of England was, and there can be no question that English law regarded it as such a corollary (S.B. 117-20; App. 828, 851-52).

3. The Crown Possessed the Legal Right To Exclude or To License Foreign Fishermen in the English Seas and the Right To Create Monopolies of Newly Discovered Fisheries; and All Fisheries in English Waters Were Subject to Regulation.

The law of England with respect to fishing rights in the English seas throughout the 17th century may be simply and categorically stated. *Prima facie*, the crown owned the sea fisheries as one of its principal *regalia* or royalties. That ownership was full and unabated with respect to the royal or great fish. As to lesser fish, English subjects had a common right to take them, except in areas of the sea where that right had been superseded by a royal grant of an exclusive fishery. Any newly discovered or developed fishery was a proper subject for an exclusive right or monopoly created by the crown.

Foreigners had no right recognized by English law to fish within the seas of England; the crown could allow them, exclude them or license them at its pleasure, and its decisions were enforced by the admirals and in the admiralty courts. Both as to English and as to foreign fishermen (to the extent they were permitted at all), England possessed law-making authority in the English seas; that is, England could and did regulate the times, places and manner of

fishing. This body of English regulatory law of sea fishing was policed by the the navy and enforced judicially in the admiralty courts.

At S.B. 75-92 we discuss a wealth of court cases, acts of Parliament, legal opinions, royal proclamations, other official pronouncements and acts of state, legal treatises, modern commentators and treaties, spanning the entire century from beginning to end, which both declared and implemented crown ownership of the fisheries throughout the English seas.[31] While the Master habitually refers to the English position as "claims," it is certain beyond question, and indeed the Master never denies, that the "claims" were fully incorporated into the positive law of England. Plaintiff's witness admitted this (App. 546-51).

The legal foundation of the crown ownership of the fisheries was uniformly declared and held to be the territorial sovereignty of the crown over the waters in which the fisheries were located. No distinction was made between surface fisheries and sedentary fisheries or mineral resources; the same sovereignty that embraced the one would equally embrace the other. This view is confirmed by the actual law and practice as to seabed and seabed-resource ownership.

4. The Crown Owned the Seabed and Subsoil of the English Seas and the Resources Thereof.

As previously seen (p. 30, *supra*), crown ownership of the seabed of the English seas was declared and recognized

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[31] For example, in the Case of the Royal Fishery of the Banne in 1610, the Privy Council, the highest court of England, held that a salmon fishery in a navigable river belonged to the crown as part of its prerogative. The *ratio decidendi* was that navigable rivers participate of the nature of the sea, and since the king owns the fisheries in the English seas he owns those in navigable rivers also (S.B. 98-100; Exhibit 157). The crown right to fisheries the court called a "royalty." *Id.* at 41.

during the mediaeval period and was taken by Diggs in Elizabeth's reign as the basic premise on which he erected his new doctrine of crown ownership of the foreshore. In the 17th century the doctrine remained unchanged and was frequently reaffirmed from beginning to end of the century. In the *Case of the Royal Fishery of the Banne* in 1610, p 45, *supra*, n. 31, England's highest court held that the "sea is . . . under the dominion of the king," and was plainly referring to the bed as well as the surface ("therefore the king shall have the land which is gained out of the sea") (S.B. 99). Later cases explicitly applied the doctrine to the bed of navigable waters (S.B. 100-05). Plaintiff's witness Professor Thorne conceded that the crown's property rights in the English seas extended both to sedentary fisheries and to subsoil mineral resources (App. 551-54).

Theory was confirmed by practice. Throughout the century the crown exercised ownership of lands reclaimed from the sea, exclusive oyster fisheries in the sea, and islands rising in the sea (S.B. 106-07; App. 92-98). Legal treatises, both 17th century and modern, uniformly recognize crown ownership of the seabed and its resources (S.B. 107-17). Among the earlier 17th-century writers, Callis in 1622 affirmed the crown ownership in detail and at length (S.B. 107-09; App. 777-83).

The Master, after discussing the writings of Selden and Hale which also unequivocally affirmed crown ownership of the seabed, correctly concluded that "by the accepted English law of the seventeenth century the prerogative rights of the crown extended to the ownership of the bed of the narrow seas adjacent to the coasts of Great Britain and Ireland" (Report, p. 35). Later, when he dealt with the colonial charters, the Master assumed that it was *only* the writings of Selden and Hale which first established seabed ownership, as a new doctrine, and therefore that the

colonial charters issued before the publication of Selden's *Mare Clausum* in 1635 conveyed no seabed rights. For the reasons given above and at pp. 63-66, *infra*, this assumption is wholly without merit.

5. Under English and International Law in the Seventeenth Century, Maritime Sovereignty and Dominion Were Not Limited to Areas Effectively Occupied; a Uniform Belt of at Least 100 Miles Was Recognized, Subject to Adjustment in Cases of Special Historical Circumstances.

The Master held that in 17th-century law, both English and international, maritime sovereignty and dominion were limited to areas of sea physically and continuously occupied by a navy (Report, pp. 35-38), and hence that the English seas had no permanent boundaries, expanding or contracting as the navy was more or less powerful (pp. 39-40). For international law the Master relies on secondary sources alone; for English law, he purports to rely on Hale and Selden.

Neither the Master nor plaintiff has cited any English authority which held that the English seas subject to English jurisdiction expanded and contracted depending on England's relative naval power; and we have encountered none. Every English authority cited in the record gave the same definition of the English seas: the entire English Channel and Bay of Biscay as far as Cape Finisterre, the North Sea up to the latitude of Cape Van Staten in Norway, and to the north and west of England to a distance which was sometimes unspecified but was defined by every writer who addressed the subject as 100 miles (S.B. 35, 47, 58, 61, 67, 68, 126, 128, 131, 212-213, 276-278). This definition was regarded as fixed and constant, and remained so through the 18th century and into the 19th century (pp. 55-58, *infra;* S.B. 126-29, 465-68).

The passage from Hale quoted by the Master (Report, pp. 35-36) does not say that physical occupation was necessary for ownership; it speaks in terms of the *capacity* for occupation, not the physical fact of occupation. The quoted passage from Selden (Report, p. 36) declares that maritime sovereignty does not arise "*altogether*" from ownership of the adjacent land, but *also* is based on "use or enjoyment of the sea," such as having a navy, prescribing rules of navigation, engaging in maritime commerce and in "admitting or excluding others at pleasure." [32]

Selden, moreover, made it plain with specific reference to English maritime sovereignty in North American waters, in a passage quoted in full at S.B. 172-174, that physical occupation of the American marginal seas was not at all necessary to affirm the English title to them. In that passage Selden based the English right to the North American marginal seas on the conventional grounds of the English discovery and settlement of the adjacent coasts, and on the performance of symbolic acts of sovereignty on

[32] From this the Master deduces (p. 38) that even in the Stuart period England did not meet Selden's test, since it did not attempt to exclude or to tax peaceful foreign vessels traveling through the English seas. Plainly, the Master is misunderstanding Selden, since Selden unquestionably believed that England possessed full sovereignty in the English seas. Selden's view, like that of most other writers of the period (S.B. 120-21), was that the right of innocent passage should as a general matter be permitted without question. Mare Clausum, pp. 123-26. But Selden makes it clear that innocent passage was not inconsistent with maritime sovereignty and dominion:

"[T]he Offices of Humanitie require, that entertainment bee given to Strangers, and that inoffensive passage bee not denied them. . . . But what is this to the Dominion of that thing, through which both Merchants and Strangers are to pass? Such a freedom of Passage would no more derogate from it . . . than the allowing of an open waie for the driving of Cattel, or Cart, or passing through upon a journie, or any other Service of that nature, through another man's Field, could prejudice the Ownership thereof." *Id.* at 123-24.

those coasts. He expressly states that seas "that were never taken into possession" might become subject to a valid title on the basis of such settlement of the adjacent coast plus a claim to the seas "in hope of using and enjoying." Other English authorities likewise denied that occupation was necessary (S.B. 61; App. 663-64, 673-74).

Every English legal writer before and during the 17th and 18th centuries who stated a limit for maritime sovereignty in the absence of special factors stated the same limit: 100 miles (S.B. references at p. 47, *supra*). The 100-mile limit was asserted during the period of the earliest colonial charters both by the Prime Minister of England, speaking officially (S.B. 58), and by the leading international law authority residing in England at the time (S.B. 35, 171; App. 804-06). As we shall see (pp. 81-84, *infra*), the 100-mile limit was incorporated in the colonial charters as well.

The relevant international law of the 17th and surrounding centuries is discussed in detail at S.B. 261-83. The nature of international law is such that a national claim or practice violates it only if there is a generally recognized and accepted consensus of international doctrine and practice forbidding that conduct[33]—a consensus which, as to the 17th century, must be deduced from, in the first instance, state practice and, as a "subsidiary means" (App. 110), the writings of learned commentators *of that period.*

No one contends or could contend that in the 17th or

[33] S.B. 263; App. 108-11; Case of the S.S. Lotus, [1927] P.C.I.J., ser. A, no. 10, at 4, 19. Even apart from the state of international law in that period, it must be remembered that national courts do not use international law as a device for rebutting the claims of their own sovereigns (S.B. 261-62, 404-05), and that it is inconceivable that an English court in the period under discussion would have regarded the maritime sovereignty which existed in English law as impeachable on international-law grounds.

preceding centuries a consensus existed either in state practice or in doctrine which outlawed England's claims to maritime sovereignty and dominion. Similar claims were made and exercised by the overwhelming majority of nations bordering on the sea; and international law, so far from forbidding such sovereignty and dominion, affirmatively countenanced it (*e.g.*, App. 803-18). There was no consensus by the 17th century limiting the extent to which such maritime rights could be claimed and exercised, except that the claim of Spain and Portugal to all the oceans of the world had been rejected. Among international-law writers who proposed some limit to maritime claims, the overwhelming majority proposed either 100 miles or 30 leagues, which is virtually identical (S.B. 271-78; App. 804-06). Sixty miles was the narrowest limit proposed by anyone (S.B. 277); it is undisputed that by the end of the 17th century no one had proposed any narrow-limit rule such as cannon shot or the three-mile limit.

For his contention that occupation was necessary under 17th-century international law the Master relies (Report, pp. 36-38) on Waldock, Oppenheim and Westlake. But none of these writers purported, in the passages relied on, to speak of any period earlier than the 20th century. For example, Waldock expressly states that the purpose of the part of his article on which the Master relies was "to set out the legal position broadly as it obtained at the outbreak of the Second World War," "The Legal Basis of Claims to the Continental Shelf," 36 *Grotius Society* 115 (1951); and there is not a word in the entire article which deals with pre-20th century law or practice.[34]

[34] Likewise the passage from Oppenheim relied on by the Master deals solely with 20th-century law. Elsewhere, Oppenheim recognizes that the earlier law contained no requirement of effective occupation. 1 Oppenheim, International Law 558-59 (8th ed. Lauterpacht 1955).

It has been conclusively established in the authoritative Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800* (1938), cited with approval by Oppenheim himself,[35] that "effective occupation" was not necessary for the establishment of sovereignty in the 17th century:

> "Next, it may be asserted on the basis of the facts that the formal ceremony of taking possession, the symbolic act, was generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'effective occupation.' A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state." App. 822; S.B. 162-64.

This passage is a summary of the entire book, which exhaustively analyzes the evidence and the law. Plaintiff's witness Professor Thorne conceded that "a claim made in the name of the King," without effective occupation, was sufficient to establish title to newly discovered territory in the 17th century (App. 546). This Court has repeatedly recognized that during the colonial period discovery, without "effective occupation," was adequate to establish English sovereignty.[36]

[35] *Loc. cit.* p. 50, *supra*, n. 34.

[36] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (Marshall, C.J.); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Massachusetts v. New York, 271 U.S. 65, 85 (1926). *Accord*, 1 Story, Commentaries on the Constitution §§ 2-38, pp. 6-18 (5th ed. 1905).

The criteria for sovereignty in the sea and seabed have always been substantially *less* stringent than as to land areas. In the 17th century sovereignty over the adjacent land territory, plus claims to maritime sovereignty and a minimum of maritime activity in portions of the marginal sea, were deemed wholly sufficient to establish title to the entire marginal sea out to at least 100 miles. Nor did subsequent law impose any requirement of prior effective occupation as to the exclusive right to exploit seabed resources; see pp. 120-29, *infra*. The English title to the North American seas and fisheries was habitually justified, not only by writers but by the British government, on the ground of English first discovery and performance of symbolic acts of sovereignty on the adjacent land areas (S.B. 164, 172-74, 231-32). The Master's attempt to import into the law of the colonial period a requirement of effective occupation for the establishment of sovereignty is wholly unhistorical, as this Court has several times held.

In 1909 the Permanent Court of Arbitration, an international tribunal applying international law, recognized that full territorial maritime sovereignty and dominion, without any "occupation" requirement, existed in the 17th century. The court referred to

> "the fundamental principles of the law of nations, *both ancient and modern*, in accordance with which, the maritime territory is an *essential appurtenance of land territory*, whence it follows that at the time when, in 1658, the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession." The Grisbadarna Case (Norway v. Sweden), Scott, *Hague Court Reports* 121, 127 (1916). (Emphasis added.)

Even if there had been an "occupation" requirement, which there was not, it was fully satisfied with respect to the marginal seas of the Common Counsel States. In the 17th and 18th centuries the capability of ships, especially their capacities with respect to provisions and their lack of space for drying fish once they were caught, was such as to make it wholly impractical for a nation to challenge the maritime supremacy of another state in the latter's adjacent waters unless the challenging nation had bases close by. Thus the Dutch could mount real contests against the British claims to sovereignty and dominion in the North Sea, for the fisheries of those waters were no farther from the Dutch ports than they were from England itself. Likewise in Canada there could be and were sharp contests between England and France over the fisheries so long as the Canadian coastline and islands were divided among those two empires. But in the adjacent waters of the Common Counsel States, far from any French bases or ports and hopelessly far from those of any other European power, possession of the coast gave England and its colonists as a practical matter complete control over the marginal seas (S.B. 224, 233-34; App. 791, 830-31).[37] The only exception proves the rule: in the waters of Maine, as in Canada, the French and English bitterly fought for a monopoly of the fisheries, and the English were successful (App. 838-46).

Plaintiff and the Master contend that the relative paucity of evidence regarding conflicts in, or exclusions of foreigners from, colonial waters means that no maritime sovereignty

[37] Plaintiff expressly conceded this point: in the marginal seas of the colonies south of Canada, "for all practical purposes control of the land meant control of the fisheries." Post-Trial Brief for the United States. 143; see also Tr. 1632.

and dominion were claimed. On the contrary, the evidence shows the colonial maritime sovereignty was unchallenged. Throughout the colonial period, England and its colonies enjoyed the exclusive use of the colonies' marginal seas.

Plaintiff and the Master have referred to no evidence whatever that foreign states or their nationals even attempted any use of the marginal seas of the Common Counsel States during the colonial period. And we can be certain from the absence of evidence that south of Maine few if any such attempts were made, simply because of the sharp and bitter conflicts that arose in areas—*e.g.*, the North Sea and Canadian and Maine waters—where such challenges were physically possible (S.B. 79-86, 222-36). Plaintiff's own witnesses conceded that if the French or other foreigners had attempted to exploit our marginal seas for fishing or otherwise, such attempts would have been resisted as they were elsewhere (App. 536, 541-42, 555).

Neither law nor practice in the 17th century or later required that, to establish exclusive title to seabed resources, a coastal state "occupy" an area of the sea or seabed *before* exploitable resources were discovered. The whole history of seabed exploitation shows that, as improved technology has made exploitation of larger areas or new resources feasible, the coastal state has automatically exercised the exclusive right to control exploitation and occupation has followed. Exploitable resources on the North American continental shelf in the 17th century thus clearly would have been claimed by the sovereign of the adjacent state, and foreigners would have been excluded. This view is consistent with, and supported by, the evidence of charters and governmental practice central to the States' claim of title int his case. See pp. 63-89, *infra*.[38]

[38] Although the Common Counsel States believe that the primary sources and commentators themselves established the 17th-century law and practice beyond reasonable dispute, they introduced before the Master the testimony of Philip C. Jessup, former Judge of the International Court of Justice, an eminent former diplomat and State Department official, and the leading scholarly expert in this country—probably in the world—on the law of the oceans (App. 106-08). Judge Jessup's testimony, in particular, demolished the claim that occupation was necessary and affirmed that coastal states had in the 17th century, and ever since have had, the exclusive right to exploit the resources of the adjacent seabed (pp. 116-29, *infra*).

C. ENGLISH SOVEREIGNTY AND DOMINION IN THE ENGLISH SEAS WERE NOT ABANDONED OR REPUDIATED EITHER BY ENGLISH LAW OR BY INTERNATIONAL LAW IN THE PERIOD 1688-1776.

The Master found that between 1688 and 1776—"sometime before 1776" (Report, p. 46) — the English law of the preceding century with respect to maritime sovereignty and dominion was "allowed to die out from practical affairs," surviving " 'only in the pages of historians, naval writers, and pamphleteers' " (p. 40), and that no maritime sovereignty and dominion then existed either in English or international law until wholly new, more limited rules (cannon shot; eventually the three-mile limit) arose (pp. 39-47, 75-76 §§ 4, 6-8, 10).

The Master's reliance for these propositions is *solely* on Fulton and on other 20th-century secondary sources, plus two English cases decided in 1876 and 1914 respectively. Not only did the Master ignore the primary, contemporary sources which are obviously the best evidence for 18th-century law and practice; the authorities on which he did rely do not support his conclusions as to the period under discussion. While Fulton does make the statement quoted by the Master at Report, p. 40, evidence Fulton himself

elsewhere brings forward helps, as we shall see in a moment, to demonstrate the falseness of that statement.[39]

As to the Master's other authorities, the Master has drawn conclusions from them with respect to a period about which they do not even purport to speak, as the Master's own quotations make clear. For example, Brownlie (Report, pp. 40-41) says a change in the law in favor of the cannon-shot rule had taken place by the "late 18th century"; but no authority we have encountered claims that this had occurred by 1776, no one has claimed that a cannon-shot or three-mile rule was heard of in English law before 1800, and Brownlie was speaking of surface waters, not the seabed.[40] Not only do the Master's own authorities provide no support whatever for his position; that position is false in fact.

The relevant 18th century English law and practice is analyzed at S.B. 124-39 on the basis of primary, contemporaneous sources. These show that the doctrine, as it existed prior to 1688, that the English seas as historically

[39] O'Connell has recently demonstrated that Fulton's statement quoted by the Master was wrong. O'Connell, "The Jurisdictional Nature of the Territorial Sea," 45 Brit. Y.B. Int'l L. 303, 316-19 (1971). Even Fulton acknowledged that the cannon-shot rule and the three-mile limit were "unknown to English law prior to 1800." Fulton, *op. cit.* at 579-80.

[40] Similarly, Potter observes merely that the claim to entire closed seas had been abandoned by the middle of the 19th century. Potter, The Freedom of the Seas 90 (1924). Elihu Root (Report, pp. 41-42) was likewise talking about a 19th-century development. The Privy Council's opinion in Attorney General for British Columbia v. Attorney General for Canada (Report, p. 42), written in 1914, merely says that the doctrine of the narrow seas is "*now* obsolete." (Emphasis added.) Similarly, Cockburn's opinion in Queen v. Keyn (Report, p. 43) says merely that as of 1876, the time of writing, the narrow-seas doctrine "is *now* exploded." (Emphasis added.) All these authorities, moreover, were dealing with claims to territorial sovereignty over the surface waters of entire seas, not with rights to the seabed resources of the continental shelf.

defined were within the realm of England and were subject to crown sovereignty and dominion, together with the historic definition of the extent of those seas, remained constant and unanimously accepted in the legal literature of the period. Fulton's passage relied on by the Master (Report, p. 40) calls these authorities "historians, naval writers, and pamphleteers". In point of fact, they included practical diplomats like Lediard (S.B. 128; App. 824-28); the most authoritative general legal writers of the period, like Blackstone, Viner and Bacon (S.B. 128-29; App. 649); judges like Comyn, Hedges and Penrice (S.B. 126-128, App. 657, 665, 693-94, 741-44); high officials in charge of the precise subject matter at issue, like Burchett (S.B. 128; App. 771-75), and the leading authorities, like Justice and the anonymous writer of 1746 (S.B. 127, 129), on the law of admiralty, which of course was the branch of law which governed English rights and jurisdiction in the seas. At least two English treaties made during the period with foreign states likewise recognized that the English seas "appertain[ed] to his majesty's dominions" (S.B. 127). The definition and exercise of the admiralty jurisdiction remained unchanged from the preceding centuries (S.B. 132-33), and the flag salute as a recognition of English maritime sovereignty was insisted upon just as before and enforced on the relatively rare occasions when it was refused (S.B. 135-36).

Nor was the British claim to regulate fishing in the English seas and to exclude unlicensed foreign fishing given up. Fulton himself recognizes that the English navy continued to enforce the exclusion of Dutch fishing, and that the British efforts, together with French depredations during the Franco-Dutch wars, were successful in destroying the Dutch fishery, replacing it by an English fishery, and thereby solving "the part of the pretention to the sovereignty of the sea which related to the fisheries along the British coasts." Fulton, *op. cit.* at 534; S.B. 129-30. British legal authority throughout the century remained

wholly consistent with these British governmental actions (S.B. 130-32). Acts of Parliament regulated the manner of fishing in the English seas, and recognized the exclusive ownership of sedentary fisheries where those had been granted by the crown (S.B. 130). And the English courts continued to rely on 17th-century authorities such as Hale for the law of maritime sovereignty and dominion (S.B. 131-32).

Crown ownership of the seabed and subsoil and the resources thereof likewise continued to be fully recognized in law. The doctrine of crown ownership of the seabed and foreshore "has been stated in varying language by judge after judge from that time [the time of Hale] to the present day [1888]." Exhibit 728, p. xxxii-iii. Blackstone is only the best known of the many 18th-century legal writers and court cases which reaffirmed and applied the unchanged 17th-century doctrine of crown ownership of the seabed of the English seas (S.B. 133-35; App. 648-49). In the face of all this evidence of record, the Master's exclusive reliance on a few non-contemporaneous secondary sources which do not even support his inferences is incomprehensible.

When the 19th- and 20th-century writers exclusively relied on by the Master describe 17th-century English claims as anachronistic or absurd, they are primarily if not entirely referring to the 17th-century claim to the whole North Sea, English Channel and Bay of Biscay as closed English seas, right up to low-water mark on the continent. It is this overreaching, quite clearly, that has given the English claim a bad name among some later commentators—although, we must repeat, the attitudes of such commentators get us precisely nowhere in understanding what the actual law of the 17th and 18th centuries was. Not subject to any such criticism is the principle that always underlay the English claim and defined it except where special historic circumstances were alleged; that is, that an

coastal state is entitled to maritime sovereignty and dominion out to 100 miles or to the median line between its coasts and those of the opposite state.

International, like English, law in the 18th century emphasized this underlying, wholly sensible recognition of legitimate, exclusive national interests in territorial waters approximating 100 miles in width. Our detailed analysis of international law at S.B. 263-83 demonstrates that there was no consensus whatever by 1776, either in state practice or in doctrine, on any restriction of maritime sovereignty to limits narrower than 100 miles. That measure remained the dominant view throughout the century, and was still distinctly in the majority as late as 1795 (S.B. 276-78). The only other view to command any appreciable support favored 60 miles (S.B. 277).

To the limited extent that more narrow limits were tentatively articulated in the 18th century—line of sight, three leagues, two leagues, cannon shot and finally three miles[41] —those rules were proposed almost entirely for neutrality purposes, that is, to define the distance into the sea where the coastal nation had the right and the duty to protect belligerent ships from one another. As we demonstrate in detail at S.B. 121-24, 278-80, England and other nations could and did establish far more modest limits for this "neutrality" purpose than for other aspects of sovereignty and dominion. Moreover, powerful maritime nations had a strong interest in limiting the extent of neutral waters, in order to minimize those areas of the sea where their weaker enemies could find sanctuary in time of war. The Master's

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[41] The Master concedes that the first identification in history of cannon shot with three miles was not made (by Galiani) until 1782 (Report, p. 45). The Master erroneously deduces that Galiani proposed three miles for "the limit of the territorial sea." In fact Galiani held that the limit, for neutrality purposes, should be two leagues, or twice the range of cannon. S.B. 308; Fulton, *op. cit.* at 563.

apparent assumption that any proposed limit of maritime sovereignty must have been proposed for all purposes is wholly contrary to the evidence of record.

The Master's position rests on a highly artificial theory of a hiatus in the law: that the 17th-century claims to whole seas vanished without a trace after 1688, leaving coastal nations with no rights of any kind out beyond low-water mark, and then after some undefined period of time territorial waters limited to cannon shot or three miles arose *ex nihilo*. Such a hiatus defies historical probability and common sense. It could not and did not happen, as O'Connell has recently shown. *Op. cit.* at 316-19. What happened, instead, was a gradual retrenchment from earlier claims to the extent they interfered with the free navigation desired by the more powerful maritime states, including England. The process of retrenchment was not far enough advanced by 1776, or even 1800, that a new rule could be regarded as having acquired the status of obligatory international law, which as we have seen requires a consensus.

But the crucial point is that the retrenchment never affected sovereign rights to exclusive exploitation of seabed resources, because the reason for the retrenchment had nothing whatever to do with that right. No 18th-century instance has been found of any authority who denied the right of a coastal state to the exclusive ownership and use of the resources of the seabed and subsoil under its marginal sea. To the contrary, those writers who addressed the question, including Puffendorf and Vattel, fully recognized that the considerations militating towards freedom of the seas—the desirability of free navigation, the natural capacity of the sea to be used by nations in common, and the inexhaustability of at least some of the fisheries—had no application to the resources of the seabed and subsoil, and thus that there was no reason for any doctrine of *res communis* to be applied there.[42] Vattel's classic 18th-century question, "Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?" (App. 173-74, 225-26), has represented the law as well as the common sense of the matter whenever and wherever the presence of exploitable seabed resources has drawn attention to the question.[43]

Even the Master has some qualms about his "hiatus" theory, since he qualifies his conclusion (Report, p. 47) that in 1776 "neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast," by excepting "those limited areas, if any, which they had actually occupied," But as we show at pp. 120-29, *infra*, even those writers who at times have suggested an "occupation" test have set its standards so low as to require no more than a bare claim. They also concede tacitly or otherwise, as state practice clearly establishes, that it is the coastal state which has the exclusive right to *make* an occupation; and they have not advanced the proposition that the occupation must be effectuated *before* an exploitable resource is discovered. And in every sense in which occupation was practically possible or could reasonably be required, Britain and its colonies were in occupation of the marginal sea and seabed of the Common Counsel States during the 18th century, and their

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[42] S.B. 281-83; Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 68, 413, 457 (1919); Colombos, The International Law of the Sea 69 (6th rev'd ed.); 1 Oppenheim, International Law 629-30 (8th ed. Lauterpacht 1955).

[43] The view that retrenchment in the limits of full territorial maritime sovereignty in the interests of free navigation entailed no such retrenchment from the prior law with respect to seabed and subsoil resources is directly supported by Judge Jessup's testimony in this proceeding. Indeed plaintiff's witness Professor Henkin substantially conceded it (App. 541).

exclusive rights were unchallenged. Moreover, the Master's apparent concession that areas close to the coast may have been "occupied," and therefore owned, requires a significant retreat from the alleged *California* doctrine that nothing was owned below low-water mark.

III.

THE AMERICAN COLONIAL CHARTERS CONVEYED THE EXCLUSIVE RIGHT TO EXPLOIT THE SEABED RESOURCES OF THE MARGINAL SEAS OF THE COLONIES.

Our detailed demonstration that the American colonial charters conveyed to their grantees the exclusive right to exploit the resources of the seabed of the marginal seas of the new English colonies is set forth at S.B. 156-231. We summarize that demonstration below.

At the outset it must be noted that here, as elsewhere, the Master embraces an "all or nothing" approach: he believes that, if it cannot be established that the charters conveyed "full sovereignty and dominion" (Report, p. 50) over the adjacent seas and seabed, then the States' case wholly falls. As elsewhere, the short answer is that the *only* issue in this proceeding is the exclusive right to explore and to exploit seabed resources; every other question and piece of evidence is relevant only insofar as it bears, either directly or by implication, on that question. The right here at issue can exist (as it concededly does today) without full territorial sovereignty or ownership of superjacent waters.[44]

A. GIVEN THE LEGAL AND POLITICAL CLIMATE IN WHICH THE CHARTERS WERE ISSUED, IT WOULD HAVE BEEN INCREDIBLE IF THE COLONIES THEY CREATED HAD NOT BEEN GRANTED SEA AND SEABED RIGHTS.

In view of the claims England was making in European waters in the 17th century and the state of English law at that time with respect to maritime sovereignty and dominion (see pp. 38-49, *supra*), it stands to reason that

[44] In the same paragraph from which we have just quoted, the Master seems to concede that the colonial charters granted the exclusive right to sea fisheries, as they surely did.

similar claims would have been made on this side of the Atlantic. Especially is this so when it is understood how closely the European developments coincided chronologically with the American colonization (S.B. 142-48) and how the same persons responsible for the chartering and establishment of the American colonies were intimately and intensely involved in vindication of the English law of maritime sovereignty and dominion in home waters (S.B. 148-62). The Master's reply is that "the concept of crown ownership of the seabed . . . was first authoritatively asserted in the works of Selden and Hale in the middle years of the 17th century after most of the colonial charters had been granted" (Report, pp. 49-50).

We have already shown that the Master was wrong in concluding that pre-1603 English law failed to recognize crown sovereignty and dominion; in particular we have relied on a much older legal tradition of seabed ownership and on Diggs' explicit assertion of crown ownership of the seabed in Elizabeth's reign and the enthusiastic implementation of his doctrines by the government at that time (p. 33, *supra*). Within the 17th century itself, the Master is wholly wrong in his assertion that English law failed to recognize crown ownership of the seabed until the writings of Selden and Hale were published. To demonstrate the contrary we rely particularly on the *Case of the Royal Fishery of the Banne*, decided in 1610 by England's highest court, the Privy Council (S.B. 49, 74, 98-100); on the Exchequer's decision in *Attorney General v. Philpott* in 1632 (S.B. 100-01); on the extremely influential treatise of Robert Callis in 1622 (S.B. 107-08); and on the official governmental treatise of Sir John Boroughs in 1633 (S.B. 64-65, 109). In addition, while Selden's treatise was not published until 1635, it was written in 1618 and was fully familiar to the king and the government from that date (S.B. 62).

Pertinent in addition are the many other early 17th-century authorities which, without specifically addressing

the question of seabed ownership, unambiguously affirmed English territorial sovereignty in the English seas, the right to exclude foreign fishermen therefrom, and English legislative, regulatory and judicial jurisdiction over activities in those seas. It never occurred to any one at this period to deny that the territorial sovereign owned all ungranted soil within the realm, to distinguish with respect to ownership or exclusive control between surface fisheries and sedentary fisheries or other seabed resources, or to regard any activities within the English seas as beyond the power of England to regulate. (See, *e.g.*, App. 807.) Thus the Master is refuted by all the early 17th-century evidence discussed at S.B. 47-124, including in particular James I's Fishing Proclamation of 1609 and the legal opinions preceding it (S.B. 56, 58; App. 675-77) (the proclamation had been in contemplation since the beginning of the reign in 1603, S.B. 142);[45] the Prime Minister's official affirmation of the 100-mile rule about 1610 (S.B. 58); Sir Julius Caesar's official legal opinions of 1610 and 1617 (S.B. 56-57; App. 712-15); James I's grant of a monopoly of whale fishing in 1613 (S.B. 85), and the writings of Welwood in 1613 (S.B. 61, 86), Coke in his *First Institute* of 1628 (S.B. 65), and Malynes in 1622 (S.B. 67, 89).

The record is conclusive that from the very beginning of the 17th century, and indeed prior thereto, English law and practice with respect to maritime sovereignty and dominion were so fully developed that it is incredible that England would have defined its new possessions in America as stopping at low-water mark.

Even if the Master were right as to the chronology — which he very plainly is not — and seabed ownership had dropped *ex nihilo* into English law in 1635, such a new

[45] Plaintiff's witness Professor Thorne admitted that acts of the King in Council, such as the proclamations of 1609 and 1635, were fully authoritative as establishing the law of England. App. 548.

principle of the common law would have been applied on this side of the Atlantic as fully as in England unless there had been some reason for it not to be so applied. Plaintiff's witnesses agreed that no such reason existed (see below), and the Master suggests none. Moreover, most of the Common Counsel States have charters dating from the period 1635-1691, when the Master admits the principle of seabed ownership was fully established.

B. THE OBJECTIVES OF BRITISH COLONIZATION REQUIRED THAT MARITIME SOVEREIGNTY AND DOMINION BE CLAIMED IN COLONIAL WATERS; AND IT WAS CLAIMED.

The Master argues (Report, pp. 51-52) that 17th-century English maritime claims "involved, at bottom, protection and security," determined by the need to defend the British Isles against hostile nearby nations; that these factors had no application to the new world; and that therefore England showed "little interest in the North American coastal seas" and failed to claim or to "occupy" them. These contentions are belied by massive evidence of record.

Even plaintiff, or at least plaintiff's witnesses, have not dared to take so extreme a position as the Master does on this point; they flatly disagreed with the Master's theory. Every one of plaintiff's four witnesses who testified as to the American colonial development—Professor Morris (S.B. 166; App. 538), Professor Thorne (S.B. 168; App. 555), Professor Henkin (S.B. 169; App. 540-41) and Dr. Kavenagh (S.B. 195; App. 537)—conceded that English law with respect to maritime sovereignty and dominion was carried to this side of the Atlantic, and that there is every reason to believe that the colonial charters would have granted and that the colonies would have claimed everything that England was claiming in European waters.

It is also wholly clear from the record that economic considerations, not merely "protection and security," were dominant in English legal and political attitudes toward maritime rights, both in European waters and in those of the American discoveries. The cause which precipitated maritime issues to the forefront of consciousness and concern in 17th-century England was "at bottom" economic, not military: the matter of the fisheries (S.B. 167-70; App. 784-91, 830-46, 881-89). Likewise, economic aggrandizement through the acquisition and monopolization of newly discovered and valuable resources — conspicuously including fisheries, sedentary fisheries and minerals — was at the heart of the whole expansion of European civilization of which the North American colonization was a part. This was true from the beginning of the process in Elizabeth's reign (S.B. 41-45), and continued unabated and intensified from the beginning of the 17th century (*e.g.*, S.B. 80-86). The exploitation of fisheries and other marine resources was of paramount importance as an objective of North American colonization.

Evidence that, so far from taking no interest in the North American seas, the English authorities from the beginning applied to those seas the full panoply of English legal rights in European waters is collected at S.B. 170-78. Throughout the 17th and 18th centuries, government officials like Sir John Coke, Burchett, Lediard, the admiralty commissioners and the law officers of the crown (S.B. 171, 174, 177-78), international-law authorities like Gentili (S.B. 171), officially sponsored government writers like Boroughs and Selden (S.B. 172-74), unofficial writers like Codrington (S.B. 175), and British treaties with France and Spain (S.B. 175-76) all recognized that the sovereignty and dominion which England claimed in its own waters were fully applicable to the marginal seas of the North American colonies. And these views were fully implemented in practice (*e.g.*, App. 784-91).

C. THE CHARTERS EXPLICITLY CONVEYED THE EXCLUSIVE RIGHT TO EXPLOIT SEA AND SEABED RESOURCES.

For simplicity we confine our discussion to the language of two of the earliest charters, the second Virginia charter of 1609 and the New England charter of 1620. No one has denied that these charters are entirely typical of the others and that corresponding provisions appear in every other charter. The relevant provisions of all the charters are set forth and analyzed at length at App. 250-331.

The pertinent granting provisions of the second Virginia charter read as follows:

> "all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and Northwest; *And also all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid;* Together with all the *Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones, Quarries,* Woods, *Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences within the said Territories, and Precincts thereof, whatsoever, and thereto and thereabouts both by Sea and Land, being, or in any sort belonging or appertaining, and which*

> *We, by our Letters Patents, may or can grant,* in as ample Manner and Sort, as We, or any our noble Progenitors, have heretofore granted to any Company, Body Politic or Corporate, or to any Adventurer or Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffic, of, in, or into any Foreign Parts whatsoever, and in as large and ample Manner, as if the same were herein particularly mentioned and expressed; . . . ." S.B. 179; App. 263-64. (Emphasis added.)

Also granted was the right

> "to dig and to search for all manner of Mines of Gold, Silver, Copper, Iron, Lead, Tin, and all sorts of Minerals, as well within the precinct aforesaid, as within and[any] part of the mainland not formerly granted to any other." S.B. 180; App. 264.

The letters patent further provided

> "that in all Questions and Doubts that shall arise upon any difficulty of Construction or Interpretation of any Thing contained either in this, or in our said former Letters-patents, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof." S.B. 180; App. 264.

The boundaries of the New England colony were stated in its charter of 1620 as follows:

> "that all that Circuit, Continent, Precincts, and Limits in America, lying and being in Breadth from Forty Degrees of Northerly Latitude, from the Equinoctial Line, to Forty eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Main Land,

from Sea to Sea, with *all the Seas*, Rivers, *Islands*, Creeks, Inlets, Ports, and Havens, within the Degrees, Precincts, and Limits of the said Latitude and Longitude, shall be the Limits, and Bounds, and Precincts of the second Colony: . . . ." S.B. 186; App. 270. (Emphasis added.)

The granting language was as follows:

"all the aforesaid Lands, and Grounds, Continent, Precinct, Place, Places and Territories, viz, the aforesaid Part of America, lying and being in Breadth from forty Degrees of Northerly Latitude from the Equinoctial Line, to forty-eight Degrees of the said Northerly Latitude inclusively, and in Length of, and within all the Breadth aforesaid, throughout the Main Land from Sea to Sea, together also with the . . . *Fishings, Mines*, and *Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones*, Quarries, and *all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining*: . . . to have and to hold, possess and enjoy, all, and singular, the aforesaid Continent, Lands Territories, *Islands*, Hereditaments, and *Precincts, Sea Waters, Fishings*, with all, and all Manner their *Commodities, Royalties, Liberties, Preeminences, and Profits*, that shall arise from thence, with all and singular their *Appurtenances*, and every Part and Parcel thereof, and of them. . . ." S.B. 187; App. 270-71. (Emphasis added.)

The favorable-construction clause also was included:

"And further our will and Pleasure is, that in all Questions and Doubts, that shall arise upon any Difficulty or Instruction or Interpretation of any Thing contained in these our Letters-patents, the same shall be taken and Interpreted in most ample and beneficial Manner, for the said Council and their Successors, and every Member thereof." S.B. 187; App. 271.

Here, in addition to the same formulas as appeared in the second Virginia charter, we have express statements that "all the seas" specified are within the boundaries of the colony, that "sea waters" are among the properties conveyed, and that the royalties and other benefits include those "within the said islands and seas adjoining." The charter language was construed in several contemporaneous authoritative documents as conveying "the seas and islands lying within 100 miles of any ~~port or~~ part of the said coast." (See p. 81, *infra*.)

The Master hardly refers to the above language, but dwells on other language which does not bear on the question at issue (Report, pp. 47-48).[46] He then finds that the charters are not "explicit" enough to convey sovereignty and dominion in the colonial seas (pp. 48-49). The decisive words of our charters are explicit as could be desired with respect to the only right at issue here: the ex-

[46] The Master is in error in alleging that in 1682 Delaware was regarded as stopping at the mouth of Delaware Bay and therefore as not including any land fronting the sea. The Cape Henlopen identified in the 1682 charters was not the present cape of that name, which *is* at the mouth of Delaware Bay, but the point where the present Delaware-Maryland boundary meets the sea. Tr. 2195-96; U.S. Geol. Surv. Bull. 1212, Boundaries of the United States and the Several States 132 (1964); Powell, "Fight of a Century Between the Penns and Calverts" 1, 3, 8, 10 (1932); Bailey, Maryland's Boundary Controversies 9 (1950). It was recognized from the beginning that Delaware was bounded not only by the "River and Bay of Delaware" but also by the "Eastern Sea." U.S. Exhibit 137, p. 238.

clusive right to exploit seabed and subsoil resources. Even apart from its use of legal terms such as royalties (pp. 73-75, *infra*), the Virginia charter granted *in haec verba* all the soils, mines, pearls and precious stones, waters and fisheries within both the land territory of the colony and the precincts[47] thereof both by sea and land. If possible even more explicitly, the New England charter granted all fisheries, mines and minerals both on the mainland "and also within the said islands and seas adjoining." What more could possibly be needed? If it be objected that no fixed limit is set to the "precincts" or "seas adjoining," we address the question of what the limit was at pp. 81-84, *infra*. But the Master's contention that the charters created exclusive rights of exploitation in *no* adjacent seabed, within any limit whatever, is palpably in conflict with the express words of the charters.

The Master seeks to contrast the language of the colonial charters with other English charters of 1610, 1621, and 1662. Noting that these latter documents conveyed "the seas" out to stated limits offshore, the Master asserts that this is proof that the crown used such language whenever the conveyance of adjacent waters and seabed was desired (Report, pp. 47-48). In view of the explicit charter language quoted above, the differences in phrasing between the charters of the Common Counsel States and other charters relied on by the Master cannot warrant a conclusion that

[47] There is no question that the term *precincts* referred not only to the area within boundaries previously described, but also to the environs or surroundings thereof. See, *e.g.*, The Oxford Universal Dictionary on Historical Principles 1564 (1955 ed.); 3 Oxford English Dictionary 1247 (1933).

The use of *appurtenances*, p. 70, *supra*, is likewise significant. Under the rule of the *Grisbadarna* case, p. 52, *supra*, during the period the marginal seas would have "automatically" passed as an "inseparable appurtenance" of the land territory without any explicit reference at all. Under modern international practice, likewise, territorial-sea and continental-shelf rights are not specified in acts of independence or cession; they pass automatically with the land. Thus the charters are far more explicit than was necessary or would be customary today.

our charters conveyed nothing in the adjoining seas and the others conveyed everything. And the Master's own comparison certainly undermines his own earlier contention that 17th-century law did not include maritime territorial sovereignty and that seabed ownership was not recognized in English law until the middle of the century.

D. THE CONVEYANCE OF JURISDICTION, FRANCHISES AND ROYALTIES CONFIRMS THAT THE CHARTERS INCLUDED SEABED EXPLOITATION RIGHTS.

The Master rejects (Report, pp. 49-50) our contention that rights in the colonial seas which included the exclusive right to exploit sea and seabed resources were conveyed as part of the jurisdiction, franchises, and royalties, both by sea and land, which were granted in all the charters.

The Master's conclusion rests in part on his premise that the 17th-century English admiralty jurisdiction was purely "protective," a premise we have shown to be wrong at pp. 41-44, *supra*. Indeed, plaintiff's witness Dr. Kavenagh conceded that the "jurisdiction" conveyed by the charters included the exclusive right to control and to license the fisheries of the American marginal seas (App. 535-36).

The Master gives virtually no reasons for his rejection of "franchises" as relevant to the issue here. We have shown that the term *franchises* was in common use as including, among other things, exclusive fisheries, as Blackstone, Hall and Moore all pointed out. Exhibit 728, p. 709; Exhibit 729, pp. 20, 33.

As to "royalties," the Master argues that a list of prerogative rights in *De Prerogativa Regis*, a document written *in the early 14th century*, does not specify the right here at issue. The fact is that in 17th-century usage the term *royalties* (sometimes *regalities* or *regalia*) was universally understood to include every one of the crown's rights

[48] The record is replete with evidence that puts this point beyond question. App. 254, 649, 675-77, 716, 719, 777, 791-94, 823, 852, 880; S.B. 13, 58-59, 60, 73, 74, 78, 79, 81, 83, 86, 89, 90, 96, 109, 112, 113, 114, 116, 133, 181.

of sovereignty and property in the adjacent sea and seabed, specifically including the exclusive right to seabed resources, and is the normal term a 17th-century conveyancer would have used to grant such rights.[48] The Master himself elsewhere concedes (Report, p. 33) that the crown's rights of ownership of the seabed and the resources thereof were referred to in the 17th century, "in conventional terminology, as the crown's royalties or regalia." Plaintiff's own witnesses likewise conceded this point (App. 555-58).

The Master goes on (p. 50) to argue that general grants of franchises and royalties conveyed nothing; that these words were mere nullities in the charters and that more specific words were necessary. The first answer, of course, is that more specific, wholly adequate words *are* present. For example, the New England charter of 1620 conveyed all "Fishings, Mines, and Minerals as well Royal Mines of Gold and Silver, as other Mine and Minerals, precious Stones, Quarries, and all, and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preeminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining" (S.B. 186; App. 270-71). Every other charter contains similar language. The Master simply ignores it.

The second answer is that the principle of construction on which the Master relies stopped far short of a general rule that a grant of all royalties and franchises necessarily conveyed nothing. The rule correctly stated was that where the language of a grant to "a common person," 17 Viner, *General Abridgement* 133 (2d ed. 1792), was so vague as to create ambiguity as to the intent of the grantor, the grant would be construed narrowly with respect to prerogative or governmental rights since it would not be presumed without a clear showing that the crown intended to convey such rights to a private person. S.B. 199-200; 17 Viner, *op. cit.* at 138-39; *Grabham v. Geales*, 81 Eng. Rep. 995 (1619). The rule had no application to the colonial charters, which

48/ (on p. 73)

created governmental, viceregal bodies with palatine prerogatives, and which expressly included provisions requiring the construction most favorable to the grantee (pp. 69-71, *supra*). Massive authority demonstrates that this view of the rule and the charters is the correct one.[49]

Finally, in *Martin*[50] and *Shively*, cited in the margin, this Court expressly relied on the "royalties" language of the charters as including a conveyance of the soil under all navigable waters, without making any distinction between inland waters and the marginal sea. The application of this principle to embrace colonial ownership of "the soil under the sea" was expressly recognized in *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 351-53 (1851). For the contrary proposition the Master relies on *Attorney General v. Trustees of the British Museum*, [1902] 2 Ch. 598; but as demonstrated at S.B. 200-01, the court's holding did not apply the rule embraced by the Master at all, but expressly reserved judgment on that point. The Master also relied on an opinion by the law officers of the crown, issued in 1723, that the New Jersey charter did not convey royal mines. The opinion, Chalmers, *Opinions of Eminent Lawyers* 141-42, did not mention the word royalties, and its authors may have overlooked its presence in the charter.[51]

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[49] S.B. 191-204; Dyke v. Walford, 5 Moore's Rep. 434 (Privy Council 1846); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Shively v. Bowlby, 152 U.S. 14, 16 (1894); Gould, The Law of Waters 70-72 (3d ed. 1900); Angell, Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof 36-38 (1826).

[50] In *Martin* this Court held that the strict-construction rules "apply more properly to a grant of some prerogative right to an individual to be held by him as a franchise and which is intended to become private property in his hands," and thus had no application to a governmental charter. 41 U.S. (16 Pet.) at 411. And the Court relied on the charter conveyance of "other royalties" as granting the soil under navigable waters. *Id.* at 413.

[51] The result was doubtless influenced by the fact that the New Jersey proprietors had surrendered their governmental rights, placing them in the position of "common persons"; and the opinion could well have

E. THE CHARTERS CONVEYED SEAS TO THE SAME DISTANCE TO WHICH ISLANDS WERE CONVEYED.

The second Virginia charter, in typical language, conveyed "all the islands lying within 100 miles along the coast." At S.B. 182-85 we demonstrate from 17th-century usage that such language was regarded either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. That view is confirmed by a grammatical analysis of a number of the charters (S.B. 184-85). Plaintiff's own witness Dr. Kavenagh admitted, on the basis of this analysis, that charter language conveying islands must be read as creating a "sea of the province," a "sea within the premises," and "the said seas . . . aforegranted" within which royalties were then conveyed (App. 528-35).

The identification of offshore islands with the intervening seas, as well as the 100-mile limit, can be traced back to the famous 14th-century jurist Bartolus (S.B. 183). Turning the argument on its head, the Master responds (Report, pp. 50-51) that Bartolus, while conceding to a coastal state offshore islands and exclusive maritime jurisdiction out to 100 miles, did not concede full sovereignty or ownership. The Master goes on to say that he finds nothing in the English writers of the 17th century contrary to Bartolus' doctrine. Quite apart from the fact that full sovereignty or ownership of the sea is unnecessary to the States' claims (p. 63, *supra*), the Master's reasoning is unpersuasive and inconsistent. The Master elsewhere asserts that 17th-century English law had advanced far be-

reached its result on the ground that the surrender included royalties (as was held by this Court, with respect to this very surrender, in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)). The opinion gives no reasoning, and states that the proprietors had not been heard on the subject.

yond that of earlier centuries with respect to maritime sovereignty and dominion, and that at least by the middle of the century crown ownership of the seabed was fully recognized in English law. What Bartolus shows is that both the 100-mile limit and the habit of thought which linked national rights in offshore islands and in the surrounding seas were long established by the 17th century. Those aspects of Bartolus' thought, as they influenced subsequent generations, are highly relevant in construing the "islands" language of the charters, even though the content of the national rights which he recognized had expanded by the 17th century.

The Master also argues that our contention as to the "islands" language "loses its force" because allegedly we do not contend that the third Virginia charter, which conveyed islands within 300 leagues of the Virginia coast, conveyed sea and seabed resources to that distance. The specific purpose of the expanded limit in that charter was to include the islands of Bermuda within the Virginia colony (App. 268). It is surely not unreasonable, in construing that charter, to take into account the fact that no 17th-century authority argued for national maritime rights as far as 300 leagues from shore,[52] while the 100-mile limit in the second Virginia charter was wholly in accordance with law and practice of the time. It may be, nonetheless that the third charter was intended to convey the sea out to 300 leagues; that construction is supported by language declaring a subsidiary purpose of the charter to be "a more ample Extent of their Limits and Territories into the Seas

[52] An exception was sometimes made in the case of waters whose opposite shores were under the same sovereignty; see S.B. 171, 252; App. Vol. III, Exhibit 816. It may be that at this early date the charter draftsmen believed that Bermuda was so situated that its surrounding seas could be claimed under this rule, or that Bermuda was itself regarded as a coast opposite Virginia justifying the assertion of sovereignty over the waters in between.

adjoining . . ." (App. 267). In any event, the claim was cut back to the earlier 100-mile boundary when Bermuda ceased to be part of Virginia later the same year (1612) the third charter was issued (App. 268-69). And the language just quoted makes it clear beyond peradventure that the customary "islands" language of the charters was understood as creating "limits and territories" in the marginal seas.

Finally, the Master states that in the second Louisiana case, *United States v. Louisiana*, 363 U.S. 1 (1960), this Court held that an early 19th-century boundary formula referring to islands within certain limits did not embrace the surrounding waters. There the Court declared that the formula in question did "not appear on its face to mean to establish a boundary line that distance from the shore," and that nothing in the history of Mississippi and Louisiana had been shown to require departure from that conclusion. 363 U.S. 1 at 81-82. In his separate opinion Justice Black, who had written for the Court in *California*, conceded that the "islands" language provided "some color of title" to boundaries in the sea and that Congress had regarded the language as highly significant. *Id.* at 96-97. In the present proceeding, unlike the Gulf States litigation, we have a record which permits construction of the "islands" language in 17th-century charters in the legal and semantic context of that time.

F. THE "FREE FISHING" CLAUSES CONFIRM THE OTHERWISE EXCLUSIVE MARITIME RIGHTS CONVEYED BY THE CHARTERS.

The Master never mentions the clauses, found in a number of the charters (S.B. 207-10), which saved and reserved to some or all classes of British subjects the right of free fishing in the seas of the colonies in question. The presence of these clauses is further proof that in their absence the

general language of the charters would have conveyed to the patentees a wholly exclusive right to the marginal-sea fisheries. No distinction is made between surface and sedentary fisheries. Foreigners were never included in the classes to whom free fishing was reserved. An eminent Maryland lawyer, Daniel Dulany, in 1766 drew the obvious conclusion that the colonies had the right to exclude from their seas all fishermen other than those who were express beneficiaries of the free-fishing clauses (S.B. 208-10). Angell, the leading early 19th-century American scholar on the law of the marginal seas, agreed (S.B. 209-10).

G. MAPS MADE IN THE COLONIAL PERIOD PROVIDE ADDITIONAL EVIDENCE FOR MARITIME SOVEREIGNTY AND DOMINION.

Some of the many maps introduced in this proceeding are reproduced in Volume III of our Appendix; see S.B. 251-54 for our detailed discussion of them. Several of these maps, not mentioned by the Master, strongly support the States' claims. For example, Exhibits 815, 615 and 616 are maps, dating respectively from the 17th century, 1726 and 1733, which show the colonial boundaries in New England as extending out into the sea. Exhibit 816, dating from 1680, shows maritime boundaries, labeled the north and south "bounds of the dominion of the British seas," extending from Van Staten and Finisterre due westwards across the Atlantic ocean to the coast of North America. Exhibit 820, a portion of a map of 1720, shows the Carolina boundary, identified as the "limit of King Charles II granted to the present proprietors of Carolina in 1663," as not stopping at the coast but rather extending a considerable distance into the sea.

Neither does the Master mention Exhibit 821, which is an early 18th-century French map of what is now the United States. The English possessions have been shaded

in, and the shading includes the marginal sea of each of the English colonies. While the boundaries of this maritime shading are somewhat eccentric—usually following north-south and east-west lines rather than the indentations of the coast, and therefore producing a curious notching effect—in most areas the shading extends approximately 100 miles from the coast.

Exhibit 816, mentioned above, also includes, south of the southern "bound" of the "dominion of the British seas," the designation "sea of Carolina, Virginia, Maryland, New York, New England." Exhibits 817, 818 and 819 designate the colonial marginal seas as the "sea of the English Empire" or the "Sea of the British Empire." Exhibit 613, dating from about 1720, divides the sea off each province by precise designations: "the Sea of Nova Scotia," "the Sea of the Province of Maine," "the Sea of New Hampshire," "the Sea of New England," "the Sea of Rhode Island," and "the Sea of New York."

The Master holds that these are mere geographical designations which involved no claim to sovereignty or ownership of any kind. But a term like "Sea of the British Empire" is obviously too unwieldy in length and political in language to be appropriate for use as a mere geographical designation. And as to the maps which name the sea of each colony separately, the fact of course is that these "seas" were in no sense separate bodies of waters geographically, but all parts of the Atlantic Ocean; the maps' insistence on dividing them by separate names corresponds to no geographical fact, but does correspond precisely to political facts.

For his view the Master relies on Sir Philip Medows, who denied that such terms as "the English seas" carried any political or proprietary connotation (Report, p. 55 n.). Medows, however, was opposed to the then-dominant

opinion. While Medows vigorously supported England's claim to full sovereignty and dominion in a belt of marginal waters around its coasts, of which belt he thought 14 miles was the *minimum* reasonable extent (S.B. 68-69), Medows did oppose the English claim, fully maintained in his time, to ownership of the entire "English seas" up to low-water mark on the shores of the continent. His minority view as to the significance of the term "English seas" can hardly be taken as authoritative with respect to the common understanding of the far more explicit and political designations on the maps in this record.

H. THE RECORD ESTABLISHES A UNIFORM TERRITORIAL SEA 100 MILES IN WIDTH OFF THE COASTS OF THE AMERICAN COLONIES.

The double charter of 1606, which conveyed the entire coastline of what are now the Common Counsel States, granted all islands within 100 miles of the coast (App. 261-62). Preservation of that 100-mile belt in subsequent charters which did not expressly mention it, and also the fact that the 100-mile limit for islands was regarded as a conveyance of the seas out to that limit, are conclusively demonstrated by a series of contemporaneous documents construing and applying the New England charter of 1620. That charter, while conveying the adjoining seas and islands, stated no exact limit for the maritime belt. Yet in three subgrants of portions of its territory made during the 1620's (App. 641-45), the Council for New England described its 1620 charter as having conveyed the land area "together with the seas and islands lying within 100 miles of any part of the said coast of the country aforesaid."

These documents, which the Master never mentions, shed decisive light on how we are to interpret both the 1620 charter and the many other charters which speak of the adjacent islands and seas without specifying any particular

distance. The Council doubtless based its construction on two factors: first, that 100 miles was generally understood to be the breadth of the territorial sea in the absence of special historic factors; second, that the charter of 1606 had established or recognized a uniform 100-mile territorial belt all up and down the Atlantic coast and that such boundaries were to be deemed incorporated into subsequent charters for particular areas. These, as well as other grants by the Council (S.B. 207-08; App. 1003-05), make the identification of island limits and maritime limits clear beyond peradventure. Further, the Council's express conveyances to its subgrantees of the seas out to three leagues, three miles and 15 miles of the coast also confirm that it viewed the 100-mile limit as incorporated by reference in the 1620 charter, that it regarded that limit as applicable to seas as well as to islands, and that it preserved to itself the ownership from those varying limits out to 100 miles.

The thrust of these documents, which the Master ignores, is explained and supported by the fact that 100 miles were generally understood in English and international law at the time to be the breadth of the territorial sea, absent special historical circumstances (pp. 47-54, *supra*). Thus it was entirely rational in the 1620's to read the New England charter as incorporating the 100-mile limit by reference to existing practice as well as the earlier charter of 1606. The same meaning may properly be imparted to the other colonies whose subsequent charters mentioned no express limit.

Certain of the colonies (*e.g.*, New Hampshire in 1635, App. 312) were granted island (and thus sea and seabed) belts of less than 100 miles, such as five leagues. In light of the establishment in 1606 of the 100-mile belt all up and down the coast, which moreover entirely conformed to the English and international law of the period, the crown in granting lesser belts to certain of the later colonies clearly

did not renounce the residue, but rather retained that residue for itself—just as the Council for New England on several occasions conveyed to subgrantees narrower belts than it was simultaneously asserting it itself possessed (S.B. 210-16). Where the crown granted only a limited part, retaining the remainder for itself, its rights and royalties passed to the States at the time of the American Revolution. (See pp. 94-98, *infra*.)

Even if the evidence did not establish a uniform 100-mile belt all along the North American coast, it does not at all follow that the exclusive right of exploitation under overall British ownership was limited in the case of each colony to the width specified in its charter. Certainly the crown frequently granted less than all it possessed, and during the 17th century the crown never took the view that its territorial sea was as constricted as, for example, the five leagues granted to New Hampshire in 1635. Rather, the proper conclusion would be that the maritime belt of exclusive exploitation was regarded as not finally fixed and defined as to its width, but embraced all those areas of sea and seabed which could reasonably be said to be adjacent to the coast or which possessed valuable resources capable of exploitation from the coast.[53]

From this conclusion it would follow that the States at independence inherited a right to hold continental-shelf rights to whatever distance was then recognized, or would come to be recognized in the future, as appropriate and proper for the exclusive seabed jurisdiction of a coastal sovereign. While no one doubts today that the exclusive exploitative rights of coastal nations in the continental shelf extend to the point where the depth of the sea reaches 200

[53] Judge Jessup has demonstrated that international law from prior to the 17th century to this day has recognized such a concept with respect to seabed resources, even though views as to the maximum permissible limit of full territorial surface rights have fluctuated upwards and downwards during the period. (See pp. 111-29, *infra*.)

meters (a line which, as it happens, is approximately 100 miles offshore along most of the North Atlantic coast), controversy continues as to whether exclusive rights extend farther. Plainly the fact that the definition of the outer limit of exclusive rights to the continental shelf is an ongoing process, which even today is not fully completed, could not lead to the conclusion that no such rights exist or existed at at particular time in the past.

I. RIGHTS OF SOVEREIGNTY AND DOMINION WERE CLAIMED AND EXERCISED IN THE MARGINAL SEAS OF THE COMMON COUNSEL STATES DURING THE COLONIAL PERIOD.

The record plainly shows that rights of sovereignty and dominion over the marginal seas and seabed of the Common Counsel States were asserted and exercised during the colonial period to the extent the question arose. The Master assumes that every instance of a colonial claim or practice has no significance beyond the precise area and the precise practice involved. We submit that, to the contrary, the evidence is chiefly relevant as indicating an underlying, universally shared view of the law which to a great extent was assumed rather than articulated.

Whenever the occasion arose—whenever exploitable resources existed, and especially whenever any challenge was made to the colonies' exclusive rights—the colonies promptly acted to assert and to exercise maritime sovereignty and dominion. The fact that such occasions were relatively rare is accounted for by the state of technology and the previously mentioned circumstance (pp. 53-54, *supra*) that the marginal seas were occupied in fact by the colonies, with no other power able to gain a foothold because of distances and the capacity of ships. (The Master himself admits, Report, p. 57, that in the case of the Common Counsel States he who controlled the shore in fact controlled the coastal fisheries.) Neither the Master nor the plaintiff has produced a single example of foreign exploitation of marine resources in the marginal seas or seabed of the Common Counsel States during the colonial period. The entire record as to the law and practice of the time puts it beyond question that any such foreign exploitation would have been instantly and successfully challenged. Plaintiff's witnesses so conceded (App. 535-36, 538-42, 554-55).

The most significant proof is the massive evidence of record, summarized at S.B. 222-23 (see also App. 830-46, 881-85, 893-94), regarding the history of Canadian waters. There the presence of rich exploitable resources led to wars between England and France over the fisheries and the adjacent coasts. Both England and France vigorously asserted that the sovereign of a coast has an exclusive right to the fisheries for many miles out — far beyond three miles; generally 100—in the absence of a treaty to the contrary. By the Treaty of Utrecht of 1713 the French conceded their exclusion from the Nova Scotia waters up to 30 leagues, substantially 100 miles (S.B. 223-24). A map used in the treaty negotiations leading to the Peace of Paris of 1783 (App. Vol. III, Exhibit 327) demonstrates that the British regarded this limit as applicable to the waters of the Common Counsel States as well.

When some concessions were made by treaty to the French in Newfoundland waters, the American colonists demonstrated their legal view of the matter by protesting those concessions as harmful to their rights and inconsistent with English sovereignty (S.B. 226-28). In repeatedly rejecting Spanish claims to fish in Newfoundland waters, the British constantly relied on the legal principle that the owner of a coast owns the fisheries in adjacent waters except only as a vested right (based on long use) or a treaty provides to the contrary (S.B. 230-32). All this happened during the 18th century, a period when the Master claims the earlier British view of maritime sovereignty and dominion had vanished without a trace.

It defies reason and human experience to assert that the Canadian experience took place in a vacuum and has no relevance as indicating the general legal views and practices of the time, applicable to the waters of the Common Counsel States as elsewhere. Obviously, the areas where the issue was as a practical matter most acute furnish the richest body of evidence. If the situation had been the same in the waters of the Common Counsel States—if resources rich enough, and near enough to foreign bases, to attract foreign exploitation, had been present in those waters—there cannot be the slighest doubt that the British and colonial posture, based on the same underlying legal attitudes, would have been the same as in Canada—as in fact it was in Maine waters, the one place south of Canada where the issue did arise (App. 784-91, 838-46, 882-89, 903-04). Nor can there be any doubt that the same legal principles would have been applied in the case of exploitable subsoil mineral resources in the marginal seas if those had existed (S.B. 240-46). Indeed, it would have been both easier and more important to ensure the exclusion of foreigners from the exploitation of such resources than to exclude them from the fisheries: the permanent and immobile installations necessary for mining would have been far easier to regulate than the fisheries, and it is inconceivable that a colony would have tolerated the construction of such installations by foreigners in its marginal waters.

As the Master admits (Report, pp. 56-58), the substantial body of evidence relating to the fisheries of the Common Counsel States, including sedentary fisheries, demonstrates colonial control, licensing, grants of exclusive fishing rights, regulation and exclusion of foreigners (S.B. 219-22, 233-41).[54] The Master asserts, however, that all this evi-

[54] One of the principal duties of the colonial admiralty officers, in the American as in the English seas, was the exclusion of foreign fishermen from adjacent waters. S.B. 220, 248-49; App. 784-91.

dence is irrelevant because he believes the fisheries in question were relatively close to shore. He concludes (without any evidence of record) that all of it was within three miles of the coast; and he therefore argues that it is irrelevant to the maritime areas beyond three miles with which this litigation deals.

The difficulty of the Master's reasoning is that *any* evidence of colonial sovereignty or dominion below low-water mark is enough to undermine the rationale of *California*, which was that evidence was lacking to show that the colonies owned the three-mile belt. No one claims that the three-mile limit had ever been heard of during the colonial period; it was invented only later. Once it is established (as it clearly is and as the Master virtually concedes) that the colonies possessed and exercised rights of sovereignty and dominion below low-water mark, the alleged *California* doctrine stands refuted and the only question is how far out those rights extended. On the basis of the governing English and international law and practice, the Canadian experience and the colonial charters themselves, colonial rights extended far beyond three miles and were generally recognized to extend out to 100 miles.

Further evidence of colonial title to submerged lands is supplied by colonial ownership and grants of derelict lands reclaimed from the sea (S.B. 241-43). While the Master recognizes the facts, he reasons that such ownership did not involve ownership of the lands before they emerged from the waters, but only afterwards (Report, p. 58). This ignores the principle, fully incorporated and well understood in English law from at the latest the time of Diggs onward, that the crown owned derelict lands *because* it had owned them while part of the seabed and the retreat of the waters caused no change in ownership (S.B. 36-38, 99-101, 110-12).

The New England fishing controversy, at the very outset of the colonial period, also illustrated the exclusive maritime rights conveyed by the charters and the intense awareness of those rights on the part of the charters' recipients (S.B. 219-22). The controversy involved a claim by Virginia that, by the double charter of 1606 (which divided the entire Atlantic seaboard between the "Southern . . . Colony" (Virginia) and the "Northern Colony" (New England)), its citizens had a right to fish in New England waters, from which they were being excluded by the grantees. The Privy Council orders of 1620-21 (expressly stated that Virginia would have the very limited right they conceded it "by the consent of both colonies" (S.B. 219; App. 678-79). The Master seeks to use the controversy to support his own conclusions by reasoning that, by allowing Virginia's claim, the Privy Council showed that the crown retained "ultimate control" of the fisheries for itself (Report, pp. 56-57).[55] However, Virginia had never argued that New England's charter rights should be overridden, but rather that the reciprocal fishing rights it claimed could be found in the double charter of 1606 itself; and, as noted, New England agreed to the Privy Council's proposal.[56] The rights conceded to Virginia themselves represented only a limited exception to the exclusive maritime dominion established by the charter. Finally, the Privy Council orders excluded other Englishmen, and that exclusion was made explicit a few months later (S.B. 219-20; App. 1001-02). No one ever suggested that *foreign* fishing should be permitted. The Council for New

[55] Other difficulties aside, the Master's argument is wholly inconsistent with his position that the law and practice of exclusive maritime dominion were not imported to this side of the Atlantic by the charters or otherwise.

[56] Of course, even if the crown retained some degree of control, that passed to the States, with other crown rights, at the time of the Revolution. See pp. 94-98, *infra*.

England zealously enforced its rights by excluding all unlicensed fishing except as permitted by the agreement of 1620-1621 (App. 784-91).

Among the many indications of record bearing on maritime sovereignty and dominion during the colonial period which are not discussed by the Master, we shall mention only the debates in Parliament leading to the passage of the New England Restraining Act of 1775, which prohibited the New England colonists from fishing in American waters (S.B. 256-57). Lord North, Prime Minister, justified the act on the ground of British ownership of the fisheries in the American seas (App. 847). Thus at the very end of the colonial period the British government still fully asserted that the American seas and their fisheries were subject to sovereign ownership and were not free to all. While there were bitter debates in Parliament on the measure, no one opposed it on the ground that the American seas and their fisheries were incapable of ownership. Quite to the contrary, the opposition argued that "the people of New England, besides the natural claim of mankind to the gifts of Providence on their own coast, are especially entitled to the fishery by their charters, which have never been declared forfeited. These charters, we think . . . to be of material consideration. The bill therefore not growing out of any judicial process [i.e., to revoke the charters] seems equally a violation of all natural and all civil right." 3 *Parliamentary Papers* 519 (1797). Obviously, the positions of both sides in this debate are squarely contrary to the Master's views.

J. THE BRITISH AND DOMINION CASES RELIED ON BY THE MASTER WHOLLY FAIL TO SUPPORT HIS CONCLUSIONS.

The Master relies (Report, pp. 52-53) on *Re Off-Shore Mineral Rights of British Columbia*, [1967] Canada L. Rep. 792, 65 D.L.R. (2d) 364, U.S. Exhibit 34, and *Bonser v. La*

Macchia, 43 Austr. L.J. Rep. 411 (1969), U.S. Exhibit 18, for the proposition that provincial ownership rights (in the case of British Columbia) and state territorial limits (in the case of New South Wales) stopped at the water's edge. The Master believes these cases support his conclusions as to the interpretation of the 17th-century American colonial charters. He seems to think that we object to reliance on these cases only on the ground that they were decided "long after 1776" (Report, p. 54), and finds such an objection not persuasive, reasoning that the cases are good authority to the extent that they discuss pre-1776 English law.

The short answer is that (1) these cases do not to *any* extent discuss pre-1776 English law: there is not a word in them dealing with the law of that period;[57] and (2) neither case dealt with colonial charters, let alone charters from the period here under discussion.

For analysis of the *British Columbia* opinion, see App. 85-89; S.B. 477-83. British Columbia never had a colonial charter; it came into existence as an unchartered British administrative unit by an act of parliament of 1858. The Canadian court's conclusion that that act reserved maritime rights to the crown, rather than delegating them to the British Columbia authorities, bears no relation whatever to the 17th-century colonial charters involved here. At S.B. 477-83 we show that other Canadian cases strongly suggest that a different result will be reached when the rights of Canada's Atlantic provinces, which did have 17th-century charters, are litigated, which they have not been as yet.

Bonser v. La Macchia (analyzed at App. 83-85; S.B. 483-

[57] The only exceptions are a few passages in Judge Windeyer's individual opinion in *Bonser*, U.S. Exhibit 18 at 289-98, in which he recognized that the older English law had recognized extensive rights of sovereignty and dominion in the marginal seas. Nowhere does he say that the law changed before 1776.

84), dealt solely with the power of the Australian federal government under a particular Australian statute to regulate offshore fisheries beyond three miles; the court unanimously held in favor of the regulation. The Master to the contrary, *Bonser* did not purport to resolve, and did not resolve, the question of territorial boundaries of the Australian states in the marginal seas, let alone the ownership of the seabed as between the Australian states and the federal government. On the question whether the territorial limits of the Australian states extend below low-water mark, *Bonser* is wholly inconclusive: two judges (Kitto and Menzies)[58] opined in the affirmative, two (Barwick and Windeyer)[59] in the negative and two (McTiernan and Owen) found it unnecessary to decide the question.[60] The issue of continental-shelf ownership was not addressed at all.

Thus the Master wholly misunderstood the alignment in the case: Judge Barwick wrote merely as one of six judges who all reached the same result, and there was no majority in favor of his view that the limits of Australian states did not extend below low-water mark. Even his individual view on that subject is irrelevant here, since the Australian states, like British Columbia, were unchartered administrative units erected in the 19th century. The allocation of powers between the imperial crown and overseas provinces in 19th-century British imperial law and practice gives no guidance whatever as to what was granted to the North American chartered colonies more than two centuries earlier, much less as to what the crown then claimed for itself. Finally, even if the question of territorial boundaries had been settled in *Bonser*, which it was not, that would not have settled the matter of continental-shelf

[58] U.S. Exhibit 18, pp. 285, 288-89.

[59] *Id.* at 277-80, 293.

[60] *Id.* at 284, 299.

rights, which were never mentioned or involved in that litigation. The question of continental-shelf rights is still wholly open in Australian law (S.B. 484), and is now in litigation there.

The Master also relies on the English decision *Queen v. Keyn*, decided in 1876 (Report, pp. 53-54), to demonstrate that "the realm . . . ended at the low-water mark on the coast." An exhaustive analysis of the many opinions in that case is in the record (App. 48-89). It demonstrates that the holding of the case was limited to the thesis that the admiralty jurisdiction did not extend to foreigners in the English seas without a specific parliamentary enactment to that effect (App. 80). That holding was based on an erroneous analysis of the history of the admiralty jurisdiction (App. 55-58; see pp. 32, 41-44, *supra*). All the judges acknowledged the existence of various crown rights in the marginal sea, *and a majority of them, unlike Cockburn on whom the Master exclusively relies, believed that the marginal sea was part of the territory of England* (App. 58-74, 80-81). The holding of *Keyn* as to the admiralty jurisdiction was promptly overruled by Parliament, which pointedly declared that the jurisdiction "extends *and has always extended* over the open seas adjacent to the coast of the United Kingdom and of all other parts of her majesty's dominions to such a distance as is necessary for the defence and security of such dominions" (App. 75-76, 646-47). (Emphasis added.) [61]

[61] The Master relies (Report, p. 46 n.), apparently for the proposition that the Territorial Waters Jurisdiction Act, in spite of its language, did not repudiate the *Keyn* decision, on the case of Harris v. Owners of the Steamship Franconia. But that case was decided *before* enactment of the Territorial Waters Jurisdiction Act. Thereafter, the British courts recognized that the Act had established that the decision in *Keyn* "was not the law of England; because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that it is and always has been the law of this country." Carr v. Francis Times & Co., (1902) A.C. 176, 181.

In addition, both Cockburn's and many of the other opinions in *Keyn* acknowledged that in earlier centuries the English law of maritime sovereignty and dominion had been far more spacious. Thus even Cockburn's dicta, taken on their own terms, asserted a change in English law after 1776—a change that would have no effect in impairing the State's claims here. And since *Keyn* never mentioned the charters or dealt with the colonies at all, there is no wisdom to be found there as to whether the English law of seabed ownership was carried to this side of the Atlantic or whether, if so carried as we contend, the law reserved the seabed to the crown or assigned it to the colonies.

Finally, this Court itself disposed of the *Keyn* dicta in *Manchester v. Massachusetts*, 139 U.S. 240, 257 (1891), observing that *Keyn* dealt only with the admiralty jurisdiction, and refused to apply it as in any way casting doubt on sovereign juridiction in territorial waters or on the right of coastal States to control sea fisheries.[62] The British courts have uniformly rejected the authority of *Keyn*, have refused to allow the *Keyn* dicta to cast any doubt on the traditional British law, and have uniformly reaffirmed the sovereignty and dominion of the crown in the marginal sea (S.B. 469-71 and 478-83). Among many examples, it is sufficient to cite *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916) (S.B. 469-70; Exhibit 165), in which the Privy Council, the highest court in Britain with respect to the colonies and dominions, squarely repudiated the *Keyn* dicta as unsound and reaffirmed the traditional doctrine of crown ownership of the seabed.

[62] For other authoritative comments on the *Keyn* case, see App. 138-40, 890-92, 977-87; Exhibits 162, 163, 164, 165; U.S. Exhibit 7, pp. 109-11; U.S. Exhibit 9, pp. 51-53, 59-61, 65-73.

IV.

THE STATES INDIVIDUALLY SUCCEEDED AT THE REVOLUTION TO ALL THE MARGINAL-SEA RIGHTS PREVIOUSLY HELD BOTH BY THE CROWN AND BY THE COLONIAL GOVERNMENTS, AND HAVE NEVER SURRENDERED TO THE FEDERAL GOVERNMENT THE EXCLUSIVE RIGHT TO EXPLOIT SEABED RESOURCES.

A. THE STATES WERE INDIVIDUALLY SOVEREIGN DURING THE REVOLUTIONARY AND CONFEDERATION PERIODS AND INHERITED ALL RIGHTS OF SOVEREIGNTY AND DOMINION BOTH OF THE CROWN AND OF THE COLONIAL GOVERNMENTS.

At independence each State became a complete sovereign, recognized as such both by our law and by international law. Accordingly, the States inherited directly all rights of sovereignty and dominion appurtenant to their territories which had been previously held either by the crown or by the antecedent colonial governments. Since the maritime claims of the crown and the colonial governments were well established, as we have already shown, it follows that they were inherited by the new States in the most direct and embracing manner. Under the constitutional law of the revolutionary period the "United States" was not regarded as a separate entity distinguished from the States, but rather as the States themselves, acting in confederation or concert for the winning of the war. Ultimate sovereignty was regarded as vested in the people of each State separately (S.B. 286-90). Congress consisted of the States, acting as all states do through their agents; and the State agents who collectively made up the Congress possessed only those powers

specifically delegated to them (S.B. 290-94). The States were individually recognized in treaties, and individually carried on substantial foreign-affairs and defense activities (S.B. 299-305; App. 230-35). Juridically the United States consisted, *de facto* before the Articles of Confederation and *de jure* thereafter, of a federation; and the international law of the period, like the Articles of Confederation themselves, was wholly clear that each state of a federation was a sovereign in the fullest sense (S.B. 294-99). These propositions, throughout our history, have commanded the all-but-universal assent of statesmen and scholars alike (S.B. 306-14).

The evidence for these propositions, discussed in detail at S.B. 286-314, is massive and overwhelming. This Court has repeatedly recognized that at independence each State became fully sovereign, in the international-law sense as in other senses, and succeeded to every territorial and property right both of the colonies and the crown; whatever the United States subsequently obtained was granted to it by the States.[63] The dicta to the contrary in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), much criticized by commentators and tacitly repudiated on

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[63] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (S.B. 341-44); Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795) (S.B. 344-50); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (S.B. 350-55); Sim's Lessee v. Irvine, 3 U.S. (3 Dall.) 424 (1799) (S.B. 355); Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800) (S.B. 355); McIlvaine v. Cox's Lessee, 8 U.S. (4 Cranch) 209 (1808) (S.B. 356); Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810) (S.B. 356); Preston v. Browder, 14 U.S. (1 Wheat.) 114 (1816) (S.B. 356); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (S.B. 358-60); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (S.B. 360); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) (S.B. 362-64); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588-92 (1839) (S.B. 308-09, 364-65); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) (S.B. 365-70).

several occasions by this Court itself (S.B. 371-75), are contrary to this otherwise unbroken line of authority and are without historical foundation.

B. THE STATES, WHETHER "EXTERNALLY SOVEREIGN" OR NOT, SUCCEEDED INDIVIDUALLY TO THE TERRITORIAL BOUNDARIES AND PROPERTY RIGHTS BOTH OF THE CROWN AND OF THE COLONIAL GOVERNMENTS, INCLUDING RIGHTS IN THE MARGINAL SEA AND SEABED.

Even if the States had not themselves achieved sovereign independence in 1776, they would still have inherited all existing rights in the marginal sea and seabed. If, contrary to historical fact, it is assumed that external sovereignty—comprising international recognition and the foreign-affairs and defense powers—had passed directly to a single "national government" at independence, the States nonetheless succeeded to antecedent territorial boundaries and property rights. The right here at issue is the exclusive right to exploit the seabed resources of the marginal seas. That right, essentially a right of ownership of property, has nothing to do with "external sovereignty." No matter when and how external sovereignty was transferred, that transfer did not carry with it the cession by the States of any portion of their territory or of any property owned by them. We have already shown (pp. 15-24, *supra*) that neither the constitutional concept of external sovereignty nor the practical exigencies of the foreign-affairs and defense powers require any cession by the States of any property or territory below low-water mark. This was the historical understanding as well.

As detailed evidence shows (S.B. 314-28), it was the universal understanding during the revolutionary period that the Revolution was in significant part fought and won to vindicate the colonial charters, and the States were

universally regarded as having succeeded to every territorial and property right which had been created by the charters and to every sovereign right of the crown itself pertaining to the colonial territories. Rights in the marginal sea were, of course, deemed an appurtenance of a land territory, passing along with that territory. Therefore, whatever the locus of the abstract concept of "external sovereignty," at independence the States succeeded individually to their boundaries, their charter rights and their common law, all as enjoyed by the antecedent colonial and proprietary governments, and in addition assumed the rights of the crown (App. 342-43, 402-08). Plaintiff's witnesses substantially conceded these propositions (S.B. 315-16).

The territorial and property rights inherited by the States were not lost at the time of the Articles of Confederation. Article IX expressly provided that "no State shall be deprived of territory for the benefit of the United States." This language was not non-controversial or *pro forma;* to the contrary, it represented the victory of the adherents of State sovereignty in a hard, bitterly fought dispute over the western lands, which divided the revolutionary statesmen both during the war itself and thereafter (S.B. 316-28). While no one ever attempted to take from the States for the benefit of the United States their rights in the marginal sea and seabed, those States not possessing charter rights to the western lands did seek to appropriate the western lands of the other States, without consent or cession by those States, for the benefit of the entire Confederation. That effort was repeatedly, decisively and categorically rejected. The western-lands controversy, ignored by the Master, furnishes the strongest possible proof that the States successfully insisted on preserving the sanctity of their charter claims in every respect, and that the federal government was regarded as acquiring no territory or property rights except those which each State chose to convey by cession.

Congress took this position in the most forceful and unambiguous terms during the negotiations which preceded the Peace of Paris of 1783. In arguing the contested American claim to the western lands, Congress steadfastly refused to rely on any argument of collective succession or devolution, but insisted throughout on relying exclusively on the sole and sufficient validity of the charter claims of the individual States (S.B. 321-27). The federal government did eventually acquire some of the western lands by State cession, but it has always regarded its title as founded solely on those acts of cession (S.B. 321). This Court has repeatedly so held.[64] In *Harcourt*, for example, the Court declared: "There was no territory within the United States that was claimed in any other right than that of some one of the confederated states. . . ." 25 U.S. (12 Wheat.) at 526.

The entire history of the western-lands question, both with respect to controversies among the States in Congress and with respect to the diplomatic negotiations leading to the Peace of Paris of 1783, can leave no doubt that, even where State charter claims were bitterly contested, they were upheld as part of our law. And *except* with respect to the western lands, nobody questioned the proposition that each State succeeded to its charter boundaries and to all territorial and property rights formerly possessed by the crown and by the antecedent colonial or proprietary government.

[64] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212-21, 222-24, 229-30 (1845) (S.B. 319-20); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 586 (1823) (S.B. 358-60); Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827) (S.B. 361-62); and Poole v. Fleeger, 36 U.S. ((11 Pet.) 184 (1837) (S.B. 362).

C. THE PEACE OF PARIS OF 1783 AND THE NEGOTIATIONS PRECEDING IT DEMONSTRATE AMERICAN AWARENESS OF MARITIME RIGHTS, SHOW NO DISAGREEMENT WITH TERRITORIAL SEAS 100 MILES IN WIDTH, AND ESTABLISHED, FOR AT LEAST SOME PURPOSES INCLUDING EXCLUSIVE FISHERIES, A 20-LEAGUE MARITIME BOUNDARY OFF THE COASTS OF THE DEFENDANT STATES.

The negotiations preceding the Peace of Paris of 1783 were devoted in substantial part to the question whether American citizens would continue to be able to fish in the waters adjacent to Newfoundland, where their ancestors had fished from colonial times, or whether, now being foreigners *vis-a-vis* the coastal sovereign, they would be excluded. The American position papers during these negotiations made it clear that the American position fully recognized that "a reasonable tract" of coastal fishery belonged to the owner of the coast, and that 100 miles and 60 miles were the most common and recognized limits for the extent of that exclusive fishery (S.B. 330-33).[65]

As to the coastal waters of the United States themselves, the Peace of Paris provided (Article II) that the boundaries of the United States should be on land as defined, and "comprehending all islands within 20 leagues of any part of the shores of the United States." Obviously the commissioners on both sides well knew that 60 miles (20 leagues) was one of the measurements most in vogue in in-

[65] With respect to the outer banks of Newfoundland, the American position was that those fisheries, being 35 leagues (about 105 miles) from land at their closest point, lay beyond the maritime belt within which an exclusive fishery could lawfully be claimed (S.B. 333). As to closer-in Canadian waters, the Americans negotiated for a share of those fisheries, *not* on the ground that these marginal seas were free to all, but solely on the ground that by long usage American fishermen had acquired a vested, established right in them (S.B. 330-32).

ternational law for the extent of exclusive fisheries and territorial waters; as we have just seen, the American position papers mentioned the 60-mile limit with respect to exclusive fisheries. The record contains copies of the maps used by both the British and American Commissioners in the negotiations, and both maps show a boundary line in the sea, obviously intended to be 20 leagues out, all along the coast of the United States (Exhibits 327, 339, App. Vol. III; Exhibit 355).

Quite plainly, as Judge Jessup and Professor Smith[66] have testified, the treaty did establish, and was understood to establish, a boundary line 20 leagues out in the sea for some purposes other than mere ownership of islands (App. 134-36, 342-44; Tr. 1195-1206, 1271-77). As Judge Jessup has emphasized, in view of the long history of fisheries disputes and treaties in the North Atlantic waters, the provision was intended at least to recognize exclusive American fisheries out to the 20-league line (Tr. 1195). That conclusion is confirmed by the fact that the British copy of the map (Exhibit 327, App. Vol. III) also shows, obviously for comparative purposes, the 30-league Treaty of Utrecht line, which dealt with exclusive fisheries, and drew that line all up and down the coast of the United States, thus confirming that Britain had asserted exclusive fishing to that limit in the marginal seas of the Common Counsel States.

The retreat from the 100-mile boundaries of the charters to 60 miles for exclusive fisheries was obviously influenced by the freedom-of-navigation theories beginning to come into vogue at this period among maritime powers. Plainly, seabed and subsoil rights would have been regarded as no more restrictive; and since the reason for the retrenchment

[66] Judge Jessup is identified at p. 55, *supra*. Joseph H. Smith is an eminent legal historian specializing in English and American colonial law (App. 240-46).

to 60 miles related to freedom of navigation, the provision carries no implication that the 100-mile charter boundaries did not remain in effect as to the seabed and subsoil, and perhaps as to surface rights other than navigation and exclusive fisheries.

The Master seems to suggest (Report, p. 64) that the "uniform" 20-league line implies that whatever marginal-sea rights were recognized by the treaty were confirmed to the United States collectively, not to each State individually. But it has never been questioned that islands off our coasts belong to the adjacent State, not to the United States as a separate territory. The States' title to their offshore islands depends, *vis-a-vis* Britain, on this very same provision of the treaty. The creation of a uniform 20-league belt carries no implication that it was to be federal rather than State territory. Indeed, the maritime belt in the North American coastal seas had always been uniform *vis-a-vis* other nations, although the crown might and did vary its grants from colony to colony. And the negotiating history of the treaty establishes beyond question the American position that all boundary and territorial claims were based on the titles of the individual States, derived from their charters (S.B. 321-27).

Finally, the Master relies (Report, p. 64) on this Court's observation in *United States v. Louisiana*, 363 U.S. 168 (1960), that the Treaty's 20-league provision should not be read to establish "territorial jurisdiction" over all waters within that belt. We submit that the entire record developed in this proceeding, and not available to the court in *Louisiana*, makes it clear that the assertion in 1783 of a 60-mile maritime belt, in the conventional "islands" language of the time, was wholly customary and in accordance with existing law. In any event, what matters here is that the treaty must, at minimum, be read as covering fisheries and other exploitable resources within the belt, whether or not full "territorial jurisdiction" was involved.

D. THE EXCLUSIVE RIGHT OF THE STATES TO EXPLOIT CONTINENTAL-SHELF RESOURCES WAS NOT TRANSFERRED TO THE UNITED STATES BY THE CONSTITUTION.

It is clear, from history as well as policy, that the Constitution effected no transfer of continental-shelf rights from the States to the federal government. Certainly there was no express transfer. The Master relies on the foreign-affairs and defense powers as effecting a transfer by implication. As already shown (pp. 15-30, *supra*), nothing in those powers requires a transfer of property rights in the marginal sea or elsewhere, and the States' retention is far more compatible with the residual sovereignty, powers and responsibilities retained by them.

The Constitution itself, as noted earlier, refutes any claim that it transferred *sub silentio* any territory or property from the States to the federal government. It provides, in Article IV, Section 3, Clause 2 that "nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State." The claims referred to are precisely claims to territory and property; the immediately preceding language is that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[67]

The thrust of the language is confirmed by its drafting history, which shows that the clause arose out of the western-lands controversy, and was intended to make clear that the Constitution did not prejudice the merits of any previously asserted State or federal title to those lands (S.B. 337-39). The clause was then broadened to make it clear that it applied to *all* territorial and property claims—such as claims to sovereignty and dominion in the marginal seas. Thus the

[67] Other provisions, previously noted, are also inconsistent with any notion of an implied transfer. See pp. 24-25, *supra*.

Constitution made it as certain as drafting could do that the vesting of certain governmental powers, such as foreign affairs and defense—"external sovereignty"—in the United States was not intended to carry any territory or property along with it.[68]

No case, except perhaps *California* and its progeny, has ever intimated that the Constitution effected any implied transfer of property.[69] It appears that the only prior case in which such a claim was made was *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818), where the Court rejected an argument that the grant of admiralty jurisdiction to the federal courts in the Constitution had divested Massachusetts of territorial sovereignty over the waters of Massachusetts Bay. Chief Justice Marshall declared:

> "The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of

[68] A proposal in the Constitutional Convention that unallocated State lands be transferred to the United States met with a total lack of support, and was quickly dropped (S.B. 339).

[69] The Master relies (Report, p. 63) on Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), and Massachusetts v. New York, 271 U.S. 65 (1926), for the proposition that a new sovereign inherits maritime sovereignty and dominion upon a transfer of sovereignty. The Master's citation simply begs the question, since the issue here is whether it is "external sovereignty" or "residual sovereignty" which controls the maritime rights here involved. The whole thrust of these and other decisions was of course that it was the States which inherited all maritime territory and property. This Court admitted in *California*, 332 U.S. at 36, that the pre-*California* cases plainly indicated that "the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

territory and of exclusive jurisdiction. . . . It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

"It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. *Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away.* The residuary powers of legislation are still in Massachusetts." 3 Wheat. at 388-89. (Emphasis added.)

E. IT WAS WELL UNDERSTOOD THROUGHOUT OUR HISTORY DOWN TO 1947 THAT UNDER THE CONSTITUTION THE STATES RETAINED THEIR RIGHTS IN THE MARGINAL SEAS AND SEABED.

It was universally recognized and understood throughout our history until the beginning of the "tidelands" controversy in the 1930's that the States individually retained whatever territorial and property rights existed in the marginal sea, and that no such rights had been transferred to the federal government by the Constitution or otherwise. The plaintiff made no such claim until 1937, when Secretary Ickes did so, reversing a position he had taken previously. Bartley, *The Tidelands Oil Controversy* 95-101, 128-35 (1953); U.S. Exhibit 11, p. 56. Little need be said about the universal understanding, since the Court in the

California case recognized and admitted it, if somewhat grudgingly, with respect to its own past decisions:

> "As previously stated, this Court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." *United States v. California,* 332 U.S. 19, 36 (1947).

While many of the cases dealt with internal waters rather than with the marginal sea, they all relied on the English law of property in land under water; and, as we have seen, that law never made any distinction between property rights in internal tide waters and those in the marginal sea. The *California* Court ignored that English legal background when it said that the statements in prior Supreme Court decisions were "merely paraphrases or offshoots of the *Pollard* inland-water rule, and were used, not as enunciation of a new ocean rule, but in explanation of the old inland-water principle." *Ibid.* The point is that English and American common law had never made any distinction whatever between "inland" and "ocean" waters with respect to property rights. There was no need for a "new" ocean rule; it had been there all along.

Moreover, *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), enunciated no "inland-water rule"; that decision expressly declared that "the territorial limits of Alabama have extended all her sovereign power into the sea." 3 How. at 230. It is beyond question that for the *Pollard* Court "navigable waters," title to the bed of which was in the States, included the marginal sea as well as

inland waters, with no distinction between them, just as had always been the case in English law and practice.

The *California* Court recognized that there were a number of cases which did specifically affirm State rights in the marginal seas, 332 U.S. at 37-38, and its own treatment of such decision actually understates their force. Speaking of *Manchester v. Massachusetts*, 139 U.S. 240 (1891), the Court observed that "the illegal fishing charged was in Buzzard's Bay, found to be within Massachusetts territory." *Id.* at 37. The *Manchester* Court, however, said nothing about limiting the Massachusetts fisheries statute in question, which extended to all of Massachusetts' waters, including its territorial sea. It held: "the extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control has been granted to the United States, this control remains with the States." 139 U.S. at 264. And the Court declared that Massachusetts had a right to territorial waters to a minimum of three miles from the coast. *Id.* at 257.[70]

The two principal 19th-century learned authorities on the law of waters likewise had no doubt that the States had preserved their rights under English law and their own charters to all their waters, including the marginal seas. Angell, *Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof* 50 and *passim* (1826);

[70] Since as we have seen the *California* Court recognized that it was overruling a long tradition of law and practice which had many times been approved in its own prior decisions, it is unnecessary to discuss in detail the many similar decisions of this and other courts. See especially U.S. Exhibit 6, pp. 672-73, 678-79, 697-98; U.S. Exhibit 8, pp. 23-26, 31-34, 48-49, 51-73, 101-26; U.S. Exhibit 11, pp. 7-8, 24-40, 51-52; U.S. Exhibit 12, pp. 10-16, 23; U.S. Exhibit 17, pp. 208-10. State-court cases are uniformly to the same effect; a few of them are cited at S.B. 115-17 and 192.

Gould, *A Treatise on the Law of Waters* 75-76 and *passim* (1900). Other authorities to the same effect are cited at S.B. 378-79. We have found no authority to the contrary.

As noted earlier, there was also throughout the period 1783-1947 a very considerable body of State legislative and administrative assertion and exercise of territorial and property rights in the marginal sea. Neither plaintiff nor the Master has contested the assertion. A large body of material on these points is found in U.S. Exhibits 1 through 17; that material has been supplemented to some extent by exhibits introduced by the Common Counsel States in this proceeding. The State powers in question are documented, and examples given, in Gould, *op. cit.* at 72-95.

Finally, when exploitable mineral resources of oil and gas began to be discovered, in the late 19th century and the early years of this century, in the seabed of the marginal seas of certain of the States, it was assumed as a matter of course for many years that it was the State government, not the federal, which had the exclusive right to explore and to exploit them.[71]

Bartley aptly described the reaction to the *California* line of cases, in the light of the universal understanding prior thereto, as follows:

[71] Bartley, The Tidelands Oil Controversy, *passim* (1953); Hearings on Submerged Oil Lands Before Subcommittee No. 4, House Committee on the Judiciary 76th Cong., 1st Sess., p. 110 (1939); Boone v. Kingsbury, 206 Cal. 148, 273 Pac. 797 (1928); Calif. Stats. 1921, c. 303, p. 404; Calif. Stats. 1923, p. 593; Ireland, "Marginal Seas Around the States," 2 La. L. Rev. 252 (1940); U.S. Exhibit 7, pp. 70-71 n. 10. The *Boone* decision held that California owned the soil of its marginal sea and had the right to license the exploitation of the mineral resources thereof. Review was sought in this Court, which denied certiorari and dismissed the appeal for want of a substantial federal question. Workman v. Boone, 280 U.S. 517 (1929).

"It came as a considerable shock to the officials of coastal states to find that they did not have the authority over the area from low-water mark to the three-mile limit which they had assumed. The coastal states for nearly 150 years had utilized and controlled the marginal sea area as though they owned it—which in fact they thought they did. They had regulated the fisheries in the area, applying state laws to vessels licensed under national statutes and operated by out-of-state persons. They had prescribed the size of fish that might be taken, had directed the manner in which fish might be caught, and had even exercised successful though indirect control over the activities of floating canneries operating outside the three-mile limit. Oysters, shrimp, and sponges had been subjected to similar controls. The states had granted or leased areas in the marginal sea to private persons and corporations and to the national government itself. The purposes of these state grants were many and varied. Long before any person dreamed of black gold, the process of land reclamation and harbor development, on land granted or leased by the states, had begun. Breakwaters had been built and harbors dredged from below low-water mark and converted to useful commercial purposes. Later, with visiions of wealth from petroleum royalties spurring them to action, the states of California, Texas, Louisiana, and, to a lesser extent, others, had leased the offshore lands for oil production." *Op. cit.* at 5; see also *id.* at 27-42.

In *United States v. Louisiana*, 363 U.S. 1, 17-19 (1960), this Court frankly recognized the overwhelming opposition to its *California* decision, and set forth conclusive evidence showing Congress' own view that the

decision was contrary to settled understanding. Quoting from the legislative history of the Submerged Lands Act, the Court described one of the Senate reports as follows:

> "S. Rep. No. 1592, 80th Cong., 2d Sess., to accompany S. 1988, at 17-18 (June 10, 1948), after noting that the legal profession had long believed that the States owned the lands under navigable waters within their territorial jurisdiction, went on to comment:
>
> " 'The evidence is conclusive that not only did our most eminent jurists so believe the law to be, but such was the belief of lower Federal court jurists and State supreme court jurists as reflected by more than 200 opinions. The pronouncements were accepted as the settled law by lawyers and authors of leading legal treatises.
>
> * * *
>
> " 'For the first time in history the Court drew a distinction between the legal principles applicable to bays, harbors, sounds, and other inland waters on the one hand, and to submerged lands lying seaward of the low-water mark on the other, although it appears the Court had ample opportunity to do so in many previous cases, but failed or refused to draw such distinction. In the California decision the Court refused to apply what it termed 'the old inland water rule' to the submerged coastal lands; however, historically speaking, it seems clear that the rule of State ownership of inland waters is, in fact, an offshoot of the marginal sea rule established much earlier.' " 363 U.S. at 18, n. 17.

It is no less clear from the legislative history that the purpose of the Act was to *restore* a pre-existing title to the

States. Quoting from House and Senate reports, the Court acknowledged:

> "H.R. Rep. No. 695, 82d Cong., 1st Sess., to accompany H.R. 4484, at 5 (July 12, 1951):
>
> " 'Title II merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters.'
>
> * * *
>
> " 'The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution.' "[72] 363 U.S. at 19, n. 17.

[72] In his separate opinion Justice Black, author of the *California* decision, likewise fully recognized Congress' conclusions and the facts on which they were based:

> " 'The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the Federal Government have always considered and acted upon the belief that these lands were the properties of the sovereign States.' " 363 U.S. at 91, n. 8.

V.

LEGAL DEVELOPMENTS BETWEEN 1787 AND 1945 DID NOT DESTROY THE EXCLUSIVE RIGHT OF THE COMMON COUNSEL STATES TO EXPLOIT THE RESOURCES OF THEIR CONTINENTAL SHELVES.

The Master took the view that the 17th-century claims to maritime sovereignty and dominion vanished without a trace long prior to 1787, leaving a hiatus during which the rights of England and other nations stopped at low-water mark. Gradually a wholly new three-mile rule developed and, at some unspecified time, acquired the force of binding international law, foreclosing national claims to maritime areas beyond it (Report, p. 66). Since the federal government was a leading adherent of the three-mile limit, that adherence destroyed any remaining rights of the States beyond three miles, including rights to seabed resources (Report, p. 68).[73]

Then, the Master's argument continues, beginning with the Truman Proclamation of 1945 a wholly new rule of international law sprang up recognizing ownership of all continental-shelf resources by the adjacent nation (Report, pp. 68-70). The federal government, having earlier destroyed the states' title by its own conduct, now acquired the very same rights on its own behalf. The Master's theory is erroneous on several independent grounds.

[73] The Master concedes one exception: he asserts that, in a few isolated cases, national exclusive rights of exploitation were admitted over certain limited seabed resources beyond three miles on the basis of long enjoyment or actual exploitation (Report, p. 69).

A. PRESENT LAW, NOT PAST LAW, SHOULD BE THE TEST OF THE STATES' TITLE.

Even if the federal government had at one time adopted an international rule or practice inconsistent with national ownership of the shelf, the federal government has long since changed that position. Since 1945, by plaintiff's admission, it has been a vigorous advocate of exclusive continental-shelf rights, while continuing to adhere to the three-mile limit with respect to full territorial sovereignty. The legitimacy of the States' title should be judged in the light of the federal government's present expressly asserted title against foreign nations, rather than in the light of an alleged implied position in past years inconsistent with that title.

In a court of equity, certainly, it would be unconscionable to presume that the federal government had extinguished State property rights through a course of conduct alleged to be inconsistent therewith, and that thereafter, by reversing that course of conduct, it had asserted and perfected those very same rights, not on behalf of the States but on behalf of itself. From an equitable point of view such a sorry argument is little better than a defense of larceny after trust.

Similarly, with respect to international law: even if for some period of years the claims of the Common Counsel States were repugnant to international law, in the end it was international law which gave way. On the Master's theory, international law changed in or about 1945 and since then has sanctioned precisely the rights in the continental shelf which the States were granted in their charters, claimed in earlier centuries and continue to claim. Today, therefore, there is concededly no conflict between the State claims and international law.

In the second Gulf States litigation, the Court measured the claims of the States against international law as it exists today. *United States v. Louisiana,* 363 U.S. 1, 33-34 (1960). Comparably, if this Court or any international court were considering the federal government's asserted exclusive rights in the continental shelf as against other nations, it would not concern itself with the international law of the 19th or early 20th centuries, but solely with the law of today. There is no reason why any different treatment should be accorded to the claims of the Atlantic States.

B. THE THREE-MILE RULE DID NOT INVALIDATE THE STATES' TITLE TO SEABED RESOURCES.

The weight of authority is to the effect that the three-mile limit never became an obligatory rule of international law, even with respect to surface waters. At S.B. 409-14 we demonstrate that the height of popularity of the three-mile rule was very brief, lasting only from about 1880 to 1930, and that even during that period its status as an obligatory rule was denied by the majority of those scholars who treated the subject. The United States, moreover, was far from consistent in its adherence to the three-mile rule (S.B. 393-401).

The Master's own authority Fulton (writing in 1911) concedes that the three-mile limit was not an obligatory rule; that it was unsound to contend "that territorial jurisdiction cannot be carried further," and that wider claims "have been quite lately fully justified . . . by the most authoritative exponents of international law . . . as well as by various international congresses of fishery experts dealing with the subject from a fishery point of view." *Op. cit.* at 664.

In any case, the definitive answer to the Master's theory is that the three-mile limit was never regarded as fully ap-

plicable to the seabed and its resources or as outlawing claims of the sort the States make here.

The three-mile limit was not a wholly new rule, springing out of nothing and creating new national rights; it represented rather a restriction or retrenchment in the previous law which had permitted nations to claim and to exercise sovereignty over far broader maritime belts (App. 132). "The sovereignty allowed by international law over portions of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean." Maine, *International Law* 78 (1888).[74]

The sole reason for this retrenchment was the desire of the principal maritime powers, including Britain and the United States, to maximize those maritime areas which were free for navigation, naval operations and to some extent surface fishing. See *e.g.*, Crocker (U.S. Dept. of State), *The Extent of the Marginal Sea* 653-56 (1919). This rationale had no application to the exploitation of seabed resources. Exclusive seabed-resource exploitation could be carried out without any significant interference with freedom of navigation in the superjacent waters. Moreover, seabed resources were recognized as capable of overexploitation leading to exhaustion, and therefore as requiring regulation to ensure their preservation. The adjacent coastal state was recognized as having a legitimate interest in such resources which made it reasonable for other states to be excluded.

Every writer we have encountered recognized that the three-mile limit could not be applied fully or mechanically to the matter of seabed resources. Fulton, for example, asserted that sedentary fisheries, as well as the mineral

[74] Exclusive rights to exploit known seabed resources are "the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea." Hurst, "Whose Is the Bed of the Sea?", 4 Brit. Y.B. Int'l L. 34, 43 (1923).

resources of the subsoil, were not subject to the narrow-limit rules applicable to surface waters or to the reasons therefor, but rather "require special treatment." Fulton, *op. cit.* at 612. Such resources "have always been considered as on a different footing from fisheries for floating fish. They may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself." *Id.* at 697.[75]

This distinction was a natural one, because maritime boundaries have never been regarded as an all-or-nothing matter, requiring specification of a fixed line within which all sovereign rights are permitted and outside which all such rights are prohibited. As this Court remarked in *United States v. Louisiana*, 363 U.S. 1, 34 (1960), "assertions of jurisdiction to different distances may be recognized for different purposes." No one denies that the three-mile limit for full territorial sovereignty did not conflict with the assertion of national jurisdiction over far broader areas for such purposes as control of smuggling (S.B. 393-94). Likewise, the three-mile limit did not abrogate exclusive rights to exploit the resources of the continental shelf.

Borchard, writing in 1941 in defense of Florida's regulation of sponge fisheries beyond three miles, regarded occupation as only one of a number of grounds for vindicating that claim:

[75] *Accord*, the British Under-Secretary of State for Foreign Affairs, speaking in Parliament in 1923, Parliamentary Debates, May 30, 1923, cols. 1265-66; Jessup, The Law of Territorial Waters 13-17 (1927); 1 Oppenheim, International Law 628-29 (8th ed. Lauterpacht 1955); Hurst, "Whose Is the Bed of the Sea?", 4 Brit. Y.B. Int'l L. 34 (1923) (App. 175-77); Waldock, "The Legal Basis of Claims to the Continental Shelf," 36 Grotius Society (1951) 115, 116-17.

"But there is another type of claim—riparian exploitation or licensing of the sedentary fisheries or subsoil mines or petroleum reserves close to the shore but outside the three-mile limit. Here other considerations enter the problem. Could a country tolerate a permanent foreign occupation or stationary works at its front door, especially if the operations occur on a shallow bank or shelf? Practical considerations would seem to dictate a negative answer. *In English history the Crown laid claim to minerals won from mines and workings below the low-water mark under the open sea adjacent to the coast but outside the three-mile limit. So, the pearl fisheries of Bahrein and Ceylon, extending many miles from shore, have for centuries been regulated by local ordinances of the riparian States,* and Vattel seems to have supported the ancient claim of monopoly in these sedentary fisheries. . . . Even so, there would be no right to interfere with navigation and surface fishing beyond the three-mile limit." Borchard, "Jurisdiction Over the Littoral Bed of the Sea," 35 *Am. J. Int'l L.* 515, 518-19 (1941). (Emphasis added.)

C. THE STATES' TITLE IS FULLY CONSISTENT WITH INTERNATIONAL LAW AND PRACTICE BOTH BEFORE AND AFTER THE TRUMAN PROCLAMATION

Far from being admitted only in a few special cases with peculiar histories, the exclusive right of coastal states to exploit and to regulate seabed resources in its adjacent continental shelf has been recognized and exercised over the years, including the period in which the three-mile rule had its greatest currency, all over the world and wherever exploitable resources exist. Judge Jessup—who is the leading

expert on the three-mile limit and law of the sea in this country and perhaps the world—discusses the evidence in detail at App. 173-230. He has adduced examples to this effect, relating to sedentary fisheries or subsea mining or both, all dating from long prior to the Truman Proclamation, in the adjacent waters of more than two dozen jurisdictions.[76]

Judge Jessup has shown that the virtually uniform practice of nations—which is the principal basis for determining international law (App. 109-13)—has been that, whenever an exploitable resource is discovered in the continental shelf of a coastal state, that state has asserted and exercised exclusive rights over exploitation of the resource.[77] He has likewise shown that such assertions have almost

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[76] Algeria, The Bahamas, British Honduras, Burma, Canada, the Channel Islands, Ceylon, Colombia, Cuba, Egypt, England, France, Greece, India, Ireland, Italy, Japan, Libya, Mexico, Pakistan, Panama, the Persian Gulf states, The Philippines, the Red Sea, Tunisia, Turkey, the United States and Venezuela. The only instance Jessup found of the apparent *failure* of a coastal nation fully to regulate or to exclude foreign exploitation of such resources is the case of the Australian pearling industry prior to 1953 (App. 193-97), a situation due to special circumstances as O'Connell has shown, International Law in Australia 280-83 (1965). Since 1953, Australia has clearly asserted and exercised the exclusive power to control and to regulate these fisheries. *Id.* at 282-83; see S.B. 476.

[77] Plaintiff's witness Professor Henkin conceded the conclusive body of state practice on which we rely:

> "Q. . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?
>
> "A I don't know of any such examples." App. 541.

never been challenged, and never effectively challenged. It is precisely this widespread, consistent assertion of national rights, coupled with the failure of other states effectively to challenge such assertions, which is the best evidence for a rule of international law.

The leading authorities accord with Judge Jessup's views. The situation was thus summarized by P.R. Feith, speaking for the relevant committee of the International Law Association in 1950:

> "At all times and in many parts of the world coastal states, have, without incurring any protests, undertaken the development of sea-bed and subsoil resources lying outside territorial waters, whenever this was technically possible.
>
> * * *
>
> "And there can be no doubt that international law has sanctioned such appropriation, even though it is in conflict with the idea of 'res communis.'" App. 198.

Edwin Borchard, an eminent American international-law authority, is to the same effect. After considering the legal bases for such claims,[78] he concludes:

[78] "Whether this jurisdiction or control be claimed as public property, under the sovereign right over the marginal sea in international law and the common law, or because the continental shelf is a continuation of the littoral state, or as a property right in the controllable soil and subsoil without any claim to surface waters, or that foreign rights in the subsoil beyond the three-mile limit would give rise to trouble, the fact is that the local claim has often been asserted and acquiesced in, especially where a specific resource was in question." Borchard, "Resources of the Continental Shelf", 40 *Am. J. Int'l L.* 53, 59-60 (1946).

> "Assertion of jurisdiction and acquiescence therein—without entering upon the abstruse question of title—must explain the coastal states' jurisdiction over unexploited resources in the continental shelf."

The United States' conduct has been fully consistent with this international practice. When the United States occupied the Philippines, it promptly prohibited unlicensed pearl fishing within three leagues of land (App. 193; Ex. 345, pp. 213-17). Significantly, the United States, while often protesting against claimed extensions of surface territorial waters beyond three miles, never protested against the many claims by other coastal states to exclusive rights to continental-shelf resources in areas where such resources were discovered and exploitable.

Judge Jessup summarized the matter in bringing the standards of international law to bear directly upon the issue of State claims:

> "To give a hypothetical example: suppose that in 1720, or 1770, or 1785, a pearl oyster bed or a tin deposit, technologically and economically exploitable, had been discovered on the seabed ten miles off the coast of Massachusetts (or any other of the Atlantic colonies) . . . . From what I know of the international law climate of that era, both generally and with particular respect to British and American attitudes, I believe it virtually certain that on the discovery of the resource Massachusetts would have asserted the exclusive right to regulate the resource, on behalf of itself, and the exclusive right to exploit it, either on behalf of its own citizens alone or on behalf of all British subjects. . . . I do not believe there would have been any significant international protest against that assertion. *And I believe that assertion*

> *would have been fully in accordance with the international law and practice of the time.* I think other sovereigns would have been bound to respect it, and I think they would have respected it. *And I do not think the legal situation was significantly different at any more recent time, including the 19th and early 20th centuries.*" (App. 229-30.) (Emphasis added.)

Judge Jessup rejected the suggestion that the federal government has ever renounced or abandoned the historic seabed claims of the Atlantic States (App. 502-03, 524).

D. INTERNATIONAL LAW AND PRACTICE DID NOT AND DOES NOT REQUIRE "OCCUPATION" IN ADVANCE OF DISCOVERY TO ESTABLISH PREEMPTIVE RIGHTS TO SEABED RESOURCES.

The Master's analysis of the States' claims is fundamentally flawed by the repeated assumption (see Report, pp. 39, 67-69) that the claims were vitiated by the States' failure to effect actual occupation of the submerged lands. In fact, as we show below, international law has never imposed any requirement of occupation by the coastal state in advance of the discovery of seabed resources.

It has been repeatedly recognized that any requirement of "effective occupation" found in the works of some writers was not in accordance with state practice and that, in any event, the standards for an "occupation" were so low as to make such a requirement essentially fictitious. Moreover, discussion has revolved around what a coastal state must do to validate its claim once an exploitable resource is discovered; no writer has ever, to the best of our knowledge, ever argued that "occupation" or any other act, even a bare claim, need antedate the discovery to give the coastal state the exclusive right to exploit a seabed resource once its discovery occurs.

Sir Hersch Lauterpacht, late Judge of the International Court of Justice and editor of the edition of Oppenheim's *International Law* from which the Master quotes, has given perhaps the most comprehensive demonstration that the claims asserted in the Truman and similar Proclamations were not inconsistent with prior international law. In his article "Sovereignty Over Submarine Areas," 27 *Brit. Y.B. Int'l L.* 376 (1950) (quoted *in extenso* at App. 155-67), Lauterpacht demolishes any notion of "effective occupation" as the test for the exclusive rights of a coastal state to its continental shelf:

> "The main argument, other than that based on the freedom of the seas, which has been raised against the acquisition of title over submarine area is that international law requires effective occupation as a condition of valid acquisition of territorial title and that no such effective occupation is possible with regard to submarine areas. That argument is based on two assumptions. The first is that the principles applicable with regard to acquisition of title over territory apply, automatically and without modification, to the novel case of the submarine areas. The second is that effective occupation is, according to international law, invariably and rigidly a condition of acquisition of territorial sovereignty. Both these assumptions are unwarranted.
>
> "Any attempt to base the title to submarine areas on the accepted notion of effective occupation must result either in a denial of the legality of the title thus claimed or in depriving the notion of effective occupation of its natural meaning. *For it is clear that in all cases in which the title to submarine areas has been proclaimed there has been no approximation to effective occupation.* There has been only a proclamation

and, in some cases, a conferment of concessions in respect of the areas in question. *This absence of effective occupation is in no way fatal to acquisition of territorial title over submarine areas.* For modern international practice does not invariably consider effective occupation to be a condition of acquisition of title. As it is occasionally put in a more circuitous fashion, the requirement of effectiveness of occupation is a matter of degree. Even that attenuated condition of effectiveness represents an over-simplification of the true legal position. What is true is that, *all other things being equal,* effective occupation constitutes, except as against the lawful sovereign, a title superior to any competing title. To that extent — but to that extent only — is it possible to consider as accurate the statement that international law has discarded discovery, purely symbolic occupation (which does not differ in nature from pretensions based on mere discovery) and similar claims, including that of contiguity, as a valid source of territorial title. Thus in modern international judicial practice the borderline between the attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration." App. 155-57.[79] (Emphasis added.)

And Lauterpacht concludes, just as the United States had done in the Bering Sea arbitration (pp. 124-25, *infra*), that what is really involved is an inherent right belonging

[79] Lauterpacht states at a later point:

> "To speak of occupation of submarine areas is to use language even more unreal than that referring to occupation, as a basis of territorial title, of arctic and antarctic regions." App. 160.

only to the adjacent coastal state, not a requirement of "occupation" which could theoretically be exercised by any nation:

> "[T] he defect of the attempt to base the title to submarine areas on occupation is not only one of logic. If 'occupation' thus conceived were the true basis of the legal claim to the adjacent submarine areas then there would be nothing—save the extra-legal remedies of intervention or self-preservation on the part of the coastal state — to prevent distant and strategically and economically powerful states from 'occupying' the adjacent submarine areas of other states by proclaiming their annexation and by emphasizing the 'effectiveness' of the title thus claimed to have been acquired by granting concessions, by legislating in respect of them, by concluding treaties—with states willing to do so—relating to the submarine areas thus acquired, and, eventually and after a long period of uncertainty, to proceed to the actual exploitation, possibly in active competition with other states, of the submarine areas in question. Wide and disturbing possibilities of friction would thus be opened not only as between the coastal state and its more or less distant neighbours but also between the neighbours themselves." App. 162-63.

Lauterpacht's conclusion is that in the absence even of a claim the coastal state has an inherent right, which is perfected by a bare claim alone once an exploitable resource has been discovered.

> "It is possible to say that the littoral state is entitled *ipso jure* to the adjacent submarine areas, but that so long as it has not perfected its title by claiming it formally through the issue of a proclamation, declaratory of an existing right, the title is merely 'inchoate'." App. 165.

Decades prior to the Truman Proclamation, in the 1890's, the United States took the official position that a coastal state has the exclusive right to exploit seabed resources beyond the three-mile limit, and that no occupation of the seabed was necessary to vindicate that right. This was done in the Bering Sea arbitration with Great Britain, where the United States attempted (unsuccessfully) to extend this principle to a surface seal fishery (S.B. 403-07; App. 215-27). As Judge Jessup pointed out (App. 217), "the United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state—which was not disputed—and unsuccessfully attempted to reason from that fact to a sovereign right over *surface* fisheries."

The United States thus attempted to extend to surface fisheries precisely the doctrine of proprietary rights which had uniformly been recognized as to seabed and subsoil resources whenever they were capable of exploitation. The United States argued:

> "These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other." App. 221.
>
> "It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of mankind; which product, if it were thrown open to the whole world, would be destroyed." App. 221.

The British contended, just as the Master has found here, that the exclusive right to exploit seabed resources depended on effective occupation of the seabed. The United States squarely rejected that contention:

> "If they [seabed resources] are so situated as to be the special advantage of a particular power, and that particular power chooses to improve that natural advantage by the creation of an industry, it establishes a right which it can defend from invasion by the citizens of other nations. The explanation of that which is attempted to be made in the printed argument of the other side is, that it depends upon an ability *to occupy the bottom.* That does not explain it. That furnishes no ground of reason whatever. If it were true, it would justify the occupation of a portion of the bottom in any place in the seas, irrespective of the question whether there was a natural advantage or not; and such right to occupy the bottom certainly does not exist. Nor *can* you occupy the bottom of the sea. It is not susceptible of occupation. . . ." App. 222-23.

The United States thus pointed out that the "occupation" theory squared neither with state practice nor with logic, since if occupation were the test an exclusive seabed right could be established not only by the coastal state but by any nation over a seabed anywhere in the world, whereas both state practice and economic considerations limited the exclusive right to that of a coastal state in the seabed of its adjacent waters. See also App. 220.[80]

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[80] The decision of the arbitral tribunal said nothing about the "occupation" issue. The United States lost the case on the ground that

Given the background of state practice which we have described, it is not surprising that the continental-shelf proclamations of the 1940's by a number of nations, including the Truman Proclamation of 1945, were readily accepted, with hardly a dissenting murmur, as valid assertions of exclusive rights of the coastal sovereign. While the Truman Proclamation was indeed an important step in the formulation of a general doctrine which clarified and made much more explicit and uniform the rights of coastal states in their continental shelves, it was no sharp reversal of prior law, but was rather the natural outgrowth, in the light of vastly expanded potential uses of continental-shelf resources, of the substantial body of state practice and customary law which had been applied for centuries to those resources whenever and wherever they had assumed practical importance.

Indeed, if the Master's position were correct, then President Truman and this country would have committed an internationally unlawful act by promulgating the Proclamation of 1945. See App. 524-25. That proclamation, asserting the exclusive right to explore and to exploit all the resources of the continental shelf of the United States, was not a mere proposal offered for comment, acquiescence or objection by other countries. To the contrary, it was self-executing and took effect immediately; hence it was unlawful if not countenanced by the international law then in effect. In fact, as we have shown, at most the proclamation and its aftermath merely made more articulate, more systematic and more comprehensive what had always been the rights of coastal states.[81] In Lauterpacht's terms, the proclamation was "declaratory of an existing right" (p. 123, *supra*).

its interference with *surface* navigation and fishery was not justified in view of the adherence of both parties to the three-mile limit. See S.B. 406-07.

[81] This was the general view taken of the legal significance of the Truman Proclamation both then and later. Judge Jessup has

Waldock, on whom the Master so heavily relies (Report, pp. 37, 69), was in entire agreement. As the passage quoted by the Master indicates (Report p. 37), Waldock did believe that under the law both before and after 1945 "occupation" of the seabed was in a sense necessary to validate a claim to the exclusive right to exploit seabed resources. However, Waldock believed that such an occupation could only be made by the adjacent coastal state, thus giving that state an exclusive right to occupy. Moreover, there is no word in Waldock's text suggesting that the occupation must be made *before* the discovery of exploitable resources. Finally and crucially, after describing the law as it existed "at the outbreak of the Second World War," 36 *Grotius Society* 115 (1951), Waldock goes on to inquire whether the Truman Proclamation was consistent with that law and concludes that it was. *Id.* at 138-49.

More specifically, he holds that the test of occupation "is not so rigorous as it is represented to be in some quarters"; that it is "impossible to maintain that actual settlement or exploitation is a *sine qua non* of effective occupation"; that "extensive assumption of jurisdiction over fairly extensive areas of sea-bed can probably be established without necessarily showing much or even any physical activity on the sea-bed itself." *Id.* at 140-41. While a proclamation asserting sovereignty to seabed areas on behalf of a non-adjacent coastal State would be a mere "paper occupation" having no legal effect, in the case of the coastal state the element of adjacency makes such a claim a valid act of appropriation. *Ibid.* Waldock concludes:

exhaustively shown (App. 145-73) that in the extensive discussions in international legal circles on the subject after 1945 the prevailing view was that the Truman Proclamation was consistent with prior law. This was likewise Lauterpacht's thesis in his article quoted at pp. 121-23, *supra*, and more extensively at App. 155-67.

> "[T]he Truman and similar Proclamations, having regard to the special circumstances of submarine territory and to the potentiality of control which contiguity gives, may properly be regarded as effective first acts of occupation. If, thereafter, such State activity takes place as the circumstances call for, the requirements of effective occupation as laid down in the leading cases would seem to be satisfied." *Id.* at 142.

Thus Waldock—the very authority on whom the Master almost exclusively relies as establishing a requirement of effective occupation in the pre-1945 law—squarely and explicitly rejects the Master's view that the Truman Proclamation was inconsistent with prior law and could be justified only by a "new continental shelf doctrine" (Report, p. 68). Waldock rejects the proposal that "an entirely new doctrine of customary law," *op. cit.* at 142, either was needed or should be adopted to validate claims such as that made by the Truman Proclamation.

The critical facts for this proceeding are that, under the law as it existed in and prior to 1945, (1) an outstanding claim to sovereignty and dominion over the continental shelf, such as was established by the law and claims of England in the 17th and 18th centuries and was embodied in the colonial charters, when coupled with such activity as the circumstances and the presence of exploitable resources warranted, was entirely sufficient to establish an exclusive right; (2) even in the absence of an outstanding claim the coastal state nonetheless possessed an exclusive right in that on the discovery of an exploitable resource it had the sole right to assert and to exercise exclusive title, and other nations could come in only if the coastal state failed to implement that right. Either of these elements of pre-1945 law would be sufficient to validate the States' claims in this proceeding. Both taken together surely are.

The Master relies heavily on the arbitral decision of Lord Asquith of Bishopstone in the Abu Dhabi Arbitration, 1 *International and Comparative Law Quarterly* (1952) 247, in which it was held that by a concession agreement of 1939 the ruler of Abu Dhabi did not intend to grant rights in the continental shelf outside territorial waters. As Judge Jessup has demonstrated (Tr. 517-19), the statements in the arbitrator's opinion on which the Master relies are dicta unnecessary to his decision, and "did not adequately appreciate the rules and principles of international law or the background of relevant international practice" App. 141.[82]

Moroever, Abu Dhabi so far as appears had never made any assertion of jurisdiction beyond three miles comparable to that made in English law and the colonial charters. And while under the Lauterpacht-Waldock view Abu Dhabi had, at the least, an inchoate and exclusive right to claim continental-shelf resources when those were discovered, such a right may well not have been covered by the particular concession language involved ("the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and of the islands and the sea waters which belong to that area"). Thus the case has little if any bearing on, let alone authority for, the issues presently involved.

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[82] Arbitral decisions have no status in international law greater than what can fairly be ascribed to them on the basis of their intrinsic merits, including the force of their reasoning, and the stature of the arbitrator or arbitrators. See 1 Whiteman (U.S. Dept. of State), Digest of International Law 94-97 (1963). Lord Asquith of Bishopstone, the sole arbitrator in the *Abu Dhabi* arbitration, was not a recognized international jurist or publicist in any sense comparable, for example, to Jessup or Lauterpacht.

VI.
THE STATES SHOULD PREVAIL EVEN IF EXCLUSIVE RIGHTS TO THE SHELF DID NOT ARISE UNTIL 1945; AND FEDERAL LEGISLATION CANNOT CONSTITUTIONALLY BE READ TO DEPRIVE THE STATES OF THEIR RIGHTS, WHETHER HISTORIC OR MODERN.

Although the fundamental basis of the States' claims has been established by prior discussion, several related issues must be addressed to provide a complete statement of the States' argument. We show below that the States are entitled to the seabed resources in question whenever such rights arose; that at the very least equal treatment principles entitle the States to establish their historic claims to three leagues on the Atlantic Coast; and that with respect to these claims, as well as to the historic claims of the States based on their charters and crown-inherited rights, federal legislation would be unconstitutional if construed to deprive the States of their property without just compensation.

A. THE ATLANTIC STATES ARE ENTITLED TO THE SHELF AS RESIDUAL SOVEREIGNS AND OWNERS OF PROPERTY OF THEIR LAND TERRITORIES, TO WHICH CONTINENTAL-SHELF RIGHTS ARE AN "INHERENT" APPURTENANCE.

In prior sections of this brief it has been shown that the States have compelling historic claims to the seabed and its resources and that such claims were not cut off by the adoption of the Constitution or any international three-mile limit or surface jurisdiction. Even if the contrary be assumed, however, unquestionably national rights to the resources of the shelf do exist today. As between the States and the federal government, the States have by far the better claim.

There is no doubt that as against the rest of the world this nation has exclusive rights to develop the natural resources of the continental shelf on the Atlantic coast.

Proclamation 2667, made by President Truman on September 28, 1945, declared that:

> "The Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." 3 C.F.R. 67, 68 (1943-48 Comp.).

International law confirms this nation's entitlement. Article II of the 1958 Geneva Convention on the Continental Shelf recognizes the rights of a state, by virtue of its sovereignty over the land to exploit the resources of the continental shelf; and such rights have been confirmed by the International Court of Justice as "inherent" and "exclusive." *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22.

Yet, the Truman Proclamation does not purport to dictate whether the States or the federal government own these resources. On the contrary, Executive Order 9633, accompanying the Proclamation, stated that:

> "neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." 3 C.F.R. 437 (1943-48 Comp.).

International law is similarly silent on this question.[83] On

[83] This Court, in United States v. Louisiana, 363 U.S. 1, recognized that the ownership of submerged lands appertaining to this nation is a matter of internal law and that ownership of such rights by the States presents no difficulty under international law. See p. 21, *supra*.

three different grounds, the States have the better claim to these rights.

First, the States' claims are directly supported by their status, under our constitutional framework, as residual sovereigns and owners of property rights within their borders. Even if continental-shelf rights are deemed to have arisen only in this century, this development rests upon a recognition that ownership of those rights is a natural extension of ownership of the adjacent coastal area:

> "[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources." *North Sea Continental Shelf Cases*, [1969] I.C.J. 1, 22.

Upon this principle, ownership of the shelf, whenever it crystallized under international law, appertained to the States which were the residual owners of the adjacent lands, just as the creation of any territory by accretion vests ownership in the owner of the adjacent parcel (S.B. 453-54).

Second, even if the States' historic claims to the seabed and its resources based on their charters and crown-inherited rights were deemed defective—for example, because of some doubts concerning the scope of the charters or because of the contraction of rights based on 19th-century international-law developments—the States at least have far better historic claims than the federal government. The great weight of historical evidence during the colonial and federal periods points in the direction of State ownership. None of the historical evidence affirmatively supports the claim of the federal government

to ownership. Similarly, both common understanding and actual practice during 150 years of American history support State ownership.

Finally, as we have already shown, the regulatory and economic interests of the States are far more closely tied to the development of the submerged lands than the constitutional interests of the federal government. The latter can be properly secured by the normal, overriding exercise of federal regulatory authority to secure the national defense and to conduct the nation's foreign affairs. The States' interests, however, are broad-ranged ones requiring both police-power authority, to regulate the development of submerged lands, and the economic benefits of their ownership, to control and to offset the economic and social burdens and costs which such development inflicts on the adjacent coastal states. (See pp. 15-30, *supra*.)

The arguments set forth above are not lengthy because they rest on historical, constitutional and actual evidence and contentions that have been presented at length in connection with earlier points in this brief. Nevertheless, these arguments rest upon the settled principle of our constitutional system, namely, that the federal government is one of limited, delegated rights and powers and that all inherent and residual sovereignty and dominion remain with the separate States. Even if the States' claims somehow fall short of establishing a vested title, they are superior by every standard to plaintiff's claim.

B. AT THE VERY LEAST, THE ATLANTIC STATES ARE ENTITLED TO PROVE HISTORIC BOUNDARIES OUT TO THREE LEAGUES UNDER FEDERAL LEGISLATION.

Even if their more extensive claims are rejected, the Atlantic States should at minimum be allowed to establish

ownership out to three leagues by proving historic boundaries on the same basis as the Gulf States. All States have a right to be treated equally by the federal government in respect of their sovereignty and political rights. This doctrine of "equal footing" or "equal status" is inherent in the Constitution, and the principle that "equality of Constitutional right and power is the condition of all States of the Union, old and new" is well-established by judicial decision. *E.g., Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1882).[84]

The Master (Report, pp. 71-72) rejected the States' equal-footing claim on the ground that the equal-footing doctrine has been said to apply to "political rights" rather than "property." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). However, in the Submerged Lands Act Congress did not merely distribute property but gave to the Gulf States—but not to the other coastal States—the political or legal right of establishing their historic boundaries extending to three leagues to entitle them to exclusive continental-shelf rights. It is surely a sovereign or political right of the Atlantic States to be able to establish their own comparable historic boundaries for the same purpose.[85]

[84] As emphasized in Coyle v. Smith, 221 U.S. 559, 567 (1911).

> " 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."

[85] The Master also states that the Atlantic coastal States never claimed seaward boundaries beyond three miles (Report, p. 72). As previous discussion shows, the Atlantic States at the time of their entry into the union had historic rights to submerged lands going well beyond three leagues.

No one can plausibly suggest that the distinction drawn by the Act between Gulf and Atlantic coast States is based on any rational judgment based upon policy considerations. As the plaintiff virtually concedes (Pl. Post-Trial Br. 18), the basic reason why the Gulf States were afforded an opportunity to demonstrate that they possess a seaward boundary greater than three miles was that Congress was unaware of any claims by the Atlantic States to more distant boundaries. The discrimination is, therefore, unjustified by any rational judgment but rests on a misapprehension of fact. The misapprehension is quite understandable since the Atlantic coast was not the subject of mineral exploration in that period, but it cannot rescue an otherwise discriminatory provision.

Finally, the Master asserts (Report, p. 72) that the equal-treatment claim has been resolved adversely to the Atlantic States by *Alabama v. Texas*, 347 U.S. 272 (1954), although he acknowledged that the Court is free to reexamine that decision. That case, which arose in a different procedural context and involved different claims, cannot be deemed determinative.[86] In any event, if *Alabama v. Texas* did resolve the present equal-status claim on a summary basis, we submit that the case was wrongly decided and should be reexamined, especially because both it and the statutory distinction at issue were made in ignorance of the historic claims of the Atlantic States.

[86] The Court there refused to allow the protesting States to file a complaint. Though equal-treatment arguments of a sort may have been made in that case, they apparently were submerged in a welter of unrelated contentions. The basic equal-treatment claim there, moreover, was aimed at depriving the Gulf States of resources beyond three miles, while in this instance the claim seeks to provide an equal opportunity for the Atlantic States to obtain submerged lands in the belt between three miles and three leagues.

If the distinction between the Atlantic and the Gulf coastal States is unconstitutional, then it follows that the Atlantic States should be allowed the same opportunity as the Gulf States to prove their rights to the resources to a distance of three leagues. This Court has full authority to provide this remedy for a denial of equal treatment, and its aptness is reinforced by the severability clause of Section 17 of the Act.[87] Since a misapprehension of fact was Congress' sole apparent reason for denying the Atlantic States the equality of treatment they seek, the extension of such equal treatment is entirely consistent with the basic policy of the Act.

C. THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF ACT ARE UNCONSTITUTIONAL IF THEY PURPORT TO DEPRIVE THE ATLANTIC STATES OF SEABED RESOURCES.

Although the Master did not discuss the point, the plaintiff may contend in this Court that the Submerged Lands and Outer Continental Shelf Acts furnish an independent ground for extinguishing the States' claims even if they were valid until 1953. Such a reading of the Acts would be contrary to their purpose and, if adopted, would render them *pro tanto* unconstitutional. The legislative history of the federal legislation confirms, beyond a shadow of a doubt, that Congress had no purpose to deprive the States of their historic claims to the submerged lands. On the contrary, the legislation was designed to restore to the States their historical rights within the three-mile belt. Where Congress understood that claims to three leagues existed in the Gulf, it specifically

[87] See Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring); Champlin Ref. Co. v. Comm'r, 286 U.S. 210, 235 (1932). *Cf.* Schacht v. United States, 398 U.S. 58 (1970).

provided that the Gulf States should have the opportunity to establish such claims. See *United States v. Louisiana*, 363 U.S. 1 (1960).

The language of the legislation is, at best, ambiguous. There are, of course, provisions representing Congress' assumption that the Atlantic and Pacific States were not advancing any claims beyond the three-mile belt;[88] on the other hand, Section 4 of the Submerged Lands Act, 43 U.S.C. § 1312, expressly provides that nothing in the provision confirming the seaward boundaries of the original States at three miles and authorizing other States to fix similar boundaries shall prejudice the existence of "any State's seaward boundary beyond three geographical miles if its laws or constitution so provided at the time the State joined the Union." It is proper to resolve the ambiguity in light of Congress' purpose to preserve and not to foreclose the States' historic claims.

If read to divest States of their historic rights to continental-shelf resources beyond three miles, the legislation would be to that extent unconstitutional. The rights possessed by the States are unquestionably property rights, though they have other aspects as well.[89] The Fifth Amendment explicitly states: "nor shall private property be taken for public use, without just compensation." It is well settled that the Fifth Amendment applies to State property taken by the federal government. While such property may indeed be taken under the power of eminent domain, the

[88] The principal language appears in a definitional provision of the Submerged Lands Act. Section 2(b), 43 U.S.C. § 1301(b). The Outer Continental Shelf Act merely incorporates by reference the assumptions or determinations of the Submerged Lands Act with respect to State ownership. See Sections 2-4, 43 U.S.C. § 1331-33.

[89] So far as the rights may be deemed territorial, the Constitution itself makes clear that the federal government may not diminish a State without its consent. See pp. 25, 102, *supra*.

Federal Government is not relieved of its duty to pay just compensation. As the Court states in *United States v. Carmack*, 329 U.S. 230, 242 (1946):

> "when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."[90]

Since no compensation was either offered or intended in this instance, any purported divestiture of the States' rights violates the Fifth Amendment.

In reply, it might be urged that no compensation need be paid on some public-use or trust theory (*Stockton v. Baltimore & N.Y. R.R.*, 32 F. 9 (C.C.N.J. 1887), *appeal dismissed*, 140 U.S. 699 (1899)); but such a doctrine can have no application where, as here, the purpose of the taking is fundamentally economic in character.[91] Similarly, this is not a case in which an uncompensated taking from a

[90] See also Oklahoma v. Atkinson Co., 313 U.S. 508, 534 (1941); St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 100-01 (1893); Yalobusha County v. Crawford, 165 F.2d 867, 869 (5th Cir. 1947); Wayne County v. United States, 53 Ct. Cl. 417, 423-24 (1918), *aff'd*, 252 U.S. 574 (1920).

[91] Quite a different question would be presented, of course, if the federal government, rather than attempting to take the States' continental-shelf rights for its own use and profit, renounced them by treaty or by acquiescence in a change in international law by which they would no longer be recognized. Such federal action, pursuant to the foreign-affairs power, would indisputably be valid and binding on the States; the hypothetical question whether compensation would be due is not involved in this proceeding.

State can be defended on the ground that the federal use is "superior" (*In re Certain Land in Lawrence*, 119 F. 453 (D. Mass. 1902)).

Plaintiff has itself recognized the obligation to pay just compensation for continental-shelf property it takes from the States. Under Section 6 of the Submerged Lands Act, 43 U.S.C. § 1314, Congress provided as to the three-mile/three-league belt of land ceded to the States that the federal government had the right to purchase undersea resources or portions of the ceded submerged lands, if required for national defense. The section explicitly provides that acquisition of the resources shall be "at the prevailing market price," and of the lands "by proceeding in accordance with due process of law and paying just compensation therefor."

CONCLUSION

For the reasons stated above, the defendant States are entitled to judgment. They own exclusive exploitation rights in the continental shelf out to 100 miles pursuant to their historic title. Wherever the continental shelf off their coasts exceeds 100 miles in width, they own exclusive exploitation rights in the remainder as residual sovereigns of the coastline to which those exclusive rights pertain.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hearby certify that I have this 29th day of November, 1974, served three (3) copies of the foregoing Exceptions and Brief and of the Supplemental Brief and Appendices of the Common Counsel States by hand delivery upon The Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. and by first-class mail, postage prepaid, upon the Attorneys General of the States of Georgia, North Carolina and South Carolina.

/s/: Brice M. Clagett

Brice M. Clagett

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